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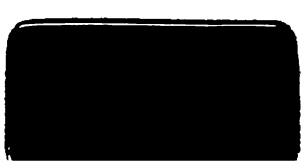

REPORTS

OF

DECISIONS

IN

THE SUPREME COURT

OF

THE UNITED STATES.

WITH NOTES, AND A DIGEST.

By B. R. CURTIS,
ONE OF THE ASSOCIATE JUSTICES OF THE COURT.

VOL. II.

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Lorenzo Sawyer

DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1807.

THE FOLLOWING JUDGES ATTENDED AT THIS TERM, NAMELY:

HON. JOHN MARSHALL, CHIEF JUSTICE.
HON. SAMUEL CHASE,
HON. BUSHROD WASHINGTON,
HON. WILLIAM JOHNSON, AND
HON. BROCKHOLST LIVINGSTON,
who was appointed during the recess, in the place of the Hon. WILLIAM PATERSON, deceased.
} ASSOCIATE JUSTICES.

JUDGE CUSHING was prevented from attending by a severe illness.

CÆSAR AUGUSTUS RODNEY, Esquire, Attorney-General, in the place of JOHN BRECKENRIDGE, Esquire, deceased.

THE UNITED STATES *v.* KIDD and WATSON.

4 C. 1.

THIS was a certificate of division of opinion in a revenue cause; but the attorney-general admitted that judgment must be given against the United States, and the court gave no opinion thereon.

[* 2] *JENNINGS v. CARSON.

4 C 2

A vessel libelled as prize, is in the custody of the law, and under the control of the court.
A prize court, in which proceedings were instituted, has power to order a sale, even after an appeal.
Where a decree, condemning a vessel as prize, also ordered a sale, and an appeal was taken, though it was irregular to sell on that decree, this irregularity will not render the captors liable to pay the amount of the sales, which did not come into their hands, but were under the control of the court.
A belligerent cruiser, who with probable cause, seizes a neutral vessel, and takes her in for adjudication and proceeds regularly, is not a wrongdoer, and is not liable for damages.

APPEAL from a decree of the circuit court of the United States for the district of Pennsylvania. The nature of the proceeding and the material facts appear in the opinion of the court.

E. Tilghman, *Lewis*, and *Dallas*, for the appellant.

Hare and *Ingersoll*, for the appellee.

* MARSHALL, C. J., delivered the opinion of the court.

[* 20] The privateer Addition, cruising under a commission granted by the congress of these United States during the war between this country and Great Britain, captured the sloop George, brought her into port, and libelled her in the court of admiralty for the State of New Jersey, where she was condemned as lawful prize, by a sentence rendered on the 31st of October, 1778, and ordered to be sold by the marshal. From this sentence Richard D. Jennings, the owner, prayed an appeal, which, on the 23d of December, 1780, came on to be heard before the court of appeals constituted by congress, when the sentence of the court of Jersey was reversed, and restitution of the vessel and cargo was awarded.

Pending the appeal, on the 13th of November, 1778, the [* 21] order of sale * was executed, and the proceeds of sale remained in possession of the marshal. It does not appear that any application was ever made to the court of New Jersey to have execution of the decree of the court of appeals, and this suit is brought to carry it into execution, or on some other principle to recover from the estate of Joseph Carson, who was part owner of the privateer Addition, the value of The George and her cargo.

So far as this bill seeks to carry into effect the decree of the 23d of December, 1780, there is no doubt of the jurisdiction of the court;

but the relief granted can only be commensurate with that decree. It is, therefore, all-essential to the merits of this cause to inquire how far Joseph Carson, the testator of the defendants, was bound by the sentence which this court is asked to carry into effect.

The words under which the plaintiffs claim are those which direct the restoration of The George and her cargo. As the captors are not ordered by name to effect this restoration, and as the order bound those in possession of the subject on which it must be construed to operate, it must be considered as affecting those who could obey it, not those who were not in possession of the thing to be restored, had no power over it, and were, consequently, unable to redeliver it. Had Richard D. Jennings appeared before the court of New Jersey with this decree in his hand, and demanded its execution, the process of that court would have been directed to those who possessed the thing to be restored, not to those who held no power over it, either in point of fact or law.

This position appears too plain to require the aid of precedent, but if such aid should be looked for, the case of Doane *v.* Penhallow[1] unquestionably affords it. In that case a decree of reversal and restitution was satisfied by directing the proceeds of the sales to be paid; and even the judge who tried the cause at the circuit concurred with his brethren in reversing his own judgment, so far as it had decreed joint damages, and had thereby rendered the defendant liable for more than he had received. The case of Doane *v.* Penhallow, therefore, which must be considered as expounding the decree * of the court of appeals now under consideration, [* 22] has decided that Joseph Carson was bound to effect restitution by that decree so far only as he was, either in law or in fact, possessed of The George and her cargo, or of the proceeds.

To this point, therefore, the inquiries of the court will be directed. In prosecuting them it will be necessary to ascertain whether —

1st. The George and her cargo were, previous to the sentence, in the custody of the law, or of the captors.

2d. Whether the court of admiralty, after an appeal from their sentence, possessed the power to sell the vessel and cargo, and to hold the proceeds for the benefit of those having the right.

It appears that the court of New Jersey, which condemned The George and her cargo as prize, was established in pursuance of the recommendation of congress, and that no legislative act had prescribed its practice, or defined its powers. The act produced in court was passed at a subsequent period, and, consequently, cannot govern

[1] 2 D. 54.

the case. But the court cannot admit the correctness of the argument drawn from this act by the counsel for the plaintiffs in error. It cannot be admitted that an act defining the powers and regulating the practice of a preëxisting court, contains provisions altogether new. The reverse of this proposition is generally true. Such an act may rather be expected to be confirmatory of the practice and of the powers really exercised.

Since we find a court instituted and proceeding to act as a court, without a law defining its practice or its powers, we must suppose it to have exercised its powers in such mode as is employed by other courts instituted for the object, and as is consonant to the general principles on which it must act.

That by the practice of courts of admiralty a vessel when [* 23] libelled is placed under the absolute control of the * court, is not controverted; but the plaintiffs contend that this power over the subject is not inherent in a court of admiralty, but is given by statute, and in support of this opinion the prize acts of Great Britain have been referred to, which unquestionably contain regulations on this point. But the court is not of opinion that those acts confer entirely new powers on the courts whose practice they regulate. In Browne's Civil and Admiralty Law, in his chapter on the jurisdiction of the prize courts, it is expressly stated that those courts exercised their jurisdiction anterior to the prize acts, and the same opinion is expressed by Lord Mansfield, in the case of Lindo *v.* Rodney, (Doug. 613, n.) which is cited by Browne. The prize acts, therefore, most probably regulated preëxisting powers in the manner best adapted to the actual circumstances of the time.

It is conceived that the constitution and character of a court of admiralty, and the object it is to effect, will throw much light on this subject.

The proceedings of that court are *in rem*, and their sentences act on the thing itself. They decide who has the right, and they order its delivery to the party having the right. The libellant and the claimant are both actors. They both demand from the court the thing in contest. It would be repugnant to the principles of justice, and to the practice of courts, to leave the thing in possession of either of the parties, without security, while the contest is depending. If the practice of a court of admiralty should not place the thing in the custody of its officers, it would be essential to justice that security should be demanded of the libellant to have it forthcoming to answer the order of the court.

If the captor should fail to libel the captured vessel, it has been truly stated in argument that the owner may claim her in the court

of admiralty. How excessively defective would be the practice of that court, if, on receiving such a claim, it neither took possession of the vessel, nor required security that its sentence should be performed. Between the rights of a claimant where a libel is filed and where it is not filed, no distinction is perceived, *and [*24] the court conceives the necessary result of proceedings *in rem* to be, that the thing in litigation must be placed in the custody of the law, and cannot be delivered to either party but on sufficient security.

In conformity with this opinion is the practice of the court of admiralty, not only when sitting for the trial of prizes, and acting in conformity with the directions of positive law, but when sitting as an instance court, and conforming to the original principles of a court of admiralty. In his chapter "on the practice of the instance court," under the title of "proceedings *in rem*," p. 397, Browne states explicitly, that when the proceeding is against a ship, the process commences with a warrant directing the arrest of the ship. In Browne, 405, the course of proceedings against a ship, not for a debt, but to obtain possession, is stated at length, and in that case, too, the court takes possession of the ship.

It must be supposed that a court of admiralty, having prize jurisdiction, and consequently, proceeding *in rem*, and not having its practice precisely regulated by law, would conform to those principles which usually govern courts proceeding *in rem*, and which seem necessarily to belong to the proper exercise of their functions. If in proceeding against a ship to subject her to the payment of a debt, or to acquire the possession of her on account of title, the regular course is, that the court takes the vessel into custody and holds her for the party having right, the conclusion seems irresistible, that in proceeding against a ship to condemn her as prize to the captor, or to restore her to the owner who has been ousted of his possession, the court will also take the vessel into custody, and hold her for the party having the right.

This reasoning is illustrated, and its correctness in a great measure confirmed, by the legislation of the United States, and the judicial proceedings of our own country. By the judicial act[1] the district courts are also courts of admiralty, and no law has regulated their practice. Yet they proceed according to the general rules of the admiralty, and a vessel libelled is always in possession of the law.

*An objection, however, to the application of this reason- [*25] ing to the case before the court, is drawn from the defectiveness of the record in the original cause, which does not exhibit a war-

[1] 1 Stats. at Large, 73.

rant to the officer to arrest The George. The first step which appears to have been taken by the court is an order to the marshal to summon a jury for the trial of the case.

The carelessness with which the papers of a court created for the purposes of the war, and which ceased to exist before the institution of this suit, have been kept, may perhaps account for this circumstance. At any rate, the court of admiralty must be presumed to have done its duty, and to have been in possession of the thing in contest, if its duty required that possession. The proceedings furnish reasons for considering this as the fact.

The libel does not state The George to have remained in possession of the captors, that the sale was made for them, or by their means, nor that the proceeds came to their hands. The answer of the defendants avers that on bringing The George into port, she was delivered up with all her papers to the court of admiralty, and although the answer is not testimony in this respect, yet the nature of the transaction furnishes ample reason to believe that this was the fact; and it is the duty of the plaintiff to show that the defendants are in a situation to be liable to his claim. If the process of the court of admiralty does not appear regular, this court, not sitting to reverse or affirm their judgment, but to carry a decree of reversal and restoration into effect, must suppose the property to be in the hands of those in whom the law places it, unless the contrary appears. The George and her cargo, therefore, must be considered as being in custody of the law, unless the contrary appears.

If this conclusion be right, it follows that the regularity of the sale is a question of no importance to the defendants, since that sale was the act of a court having legal possession of the thing, and acting on its own authority.

[*26] * If the reasoning be incorrect, it then becomes necessary to inquire,

2. Whether the court of New Jersey, after an appeal from its sentence, possessed the power of selling The George and her cargo, and holding the proceeds for the party having the right.

That the British courts possess this power is admitted, but the plaintiffs contend that it is conferred by statute, and is not incident to a prize court.

That the power exists while the cause is depending in court seems not to be denied, and indeed may be proved by the same authority, and the same train of reasoning, which has already been used to show the right to take possession of the thing whenever proceedings are *in rem*. Browne, in his chapter on the practice of the instance court, shows its regular course to be, to decree a sale where the goods are in a perishable condition.

The plaintiffs allege that this power to decree a sale is founded on the possession of the cause, but the court can perceive no ground for such an opinion. It is supported by no principle of analogy, and is repugnant to the reason and nature of the thing.

In cases only where the subject itself is in possession of the court, is the order of sale made. If it be delivered on security to either party, an order of sale pending the cause is unheard of in admiralty proceedings. The motive assigned for the order, never is that the court is in possession of the cause, but that the property in possession of the court is in a perishable state. A right to order a sale is for the benefit of all parties, not because the case is depending in that particular court, but because the thing may perish while in its custody, and while neither party can enjoy its use.

If, then, the principle on which the power of the court to order a sale depends, is, not that the cause is depending in court, but that perishable property is in its possession, this principle exists in as much force after as before an appeal. The property does not follow the appeal into the superior * court. It still re- [* 27] mains in custody of the officer of that court in which it was libelled. The case of its preservation is not altered by the appeal. The duty to preserve it is still the same, and it would seem reasonable that the power consequent on that duty would be also retained.

On the principles of reason therefore, the court is satisfied that the tribunal whose officer retains possession of the thing, retains the power of selling it when in a perishing condition, although the cause may be carried by appeal to a superior court. This opinion is not unsupported by authority.

In his chapter on the practice of the instance court, page 405, Browne says, " If the ship or goods are in a state of decay, or of a perishable nature, the court is used, during the pendency of a suit, or sometimes, after sentence, notwithstanding an appeal, to issue a commission of appraisement and sale, the money to be lodged with the registrar of the court, *in usum jus habentis.*"

This practice does not appear to be established by statute, but to be incident to the jurisdiction of the court, and to grow out of the principles which form its law. A prize court, not regulated by particular statute, would proceed on the same principles; at least there is the same reason for it.

But there is in this case no distinct order of sale. The order is a part of the sentence from which an appeal was prayed, and is, therefore, said to be suspended with the residue of that sentence.

The proceedings of the court of admiralty, if they are all before this court, were certainly very irregular, and much of the difficulty of

this case arises from that cause; but as this case stands, it would seem entirely unjust to decree the defendant to pay a heavy sum of money, because the court of admiralty has done irregularly that which it had an unquestionable right to do.

Since the court of admiralty possessed the power of making a distinct order of sale immediately after the appeal was entered,
[*28] and this, but for the depreciation, would *have been desirable by all, it is not unreasonable to suppose the practice to have been, to consider the appeal as made from the condemnation, and not from the order of sale. The manner in which this appeal was entered affords some countenance to this opinion. In the recital of the matter appealed from, the condemnation alone, not the order of sale, is stated.

The court will not consider this irregularity of the admiralty, in ordering what was within its power, as charging the owners of the privateer, under the decree of the 23d of December, 1780, with the amount of the sales of The George and her cargo, which in point of fact never came to their hands, and over which they never possessed a legal control, for the marshal states himself to hold the net proceeds, to the credit of the former owners.

It is, therefore, the unanimous opinion of this court, that the decree of the 23d of December, 1780, does not require that the restoration and redelivery which it orders should be effected by the captors, but by those who in point of law and fact were in possession either of The George and her cargo, or of the money for which they were sold. As the officer of the court of New Jersey, not the captors, held this possession, the decree operates upon him, not upon them.

On that part of the libel in this case which may be considered as supplemental, and as asking relief in addition to that which was given by the decree of the 23d of December, 1780, the court deems it necessary to make but a very few observations.

The whole argument in favor of this part of the claim is founded on the idea that the captors were wrongdoers, and are responsible for all the loss which has been produced by their tortious act. The sentence of reversal and restoration is considered by the plaintiffs as conclusive evidence that they were wrongdoers.

But the court can by no means assent to this principle. A belligerent cruiser who with probable cause seizes a neutral and
[*29] takes her into port for adjudication *and proceeds regularly is not a wrongdoer. The act is not tortious. The order of restoration proves that the property was neutral, not that it was taken without probable cause. Indeed, the decree of the court of appeals is in this respect in favor of the captors, since it does not award

damages for the capture and detention, nor give costs in the suit below.

If we pass by the decree, and examine the testimony on which it was founded, we cannot hesitate to admit that there was justifiable cause to seize and libel the vessel.

Upon the whole case, then, the court is unanimously of opinion, that the decree of the circuit court ought to be affirmed.

Sentence affirmed.

8 C. 110.

RHINELANDER *v.* THE INSURANCE COMPANY OF PENNSYLVANIA.

4 C. 29.

Where there is a complete taking at sea by a belligerent, and his possession continues to the time of the abandonment, there is a constructive total loss which justifies the abandonment, though the property be neutral.

The state of the loss at the time of the abandonment fixes the rights of the parties, and the subsequent release of the vessel does not prevent the recovery as for a total loss.

CERTIFICATE of a division of opinion from the circuit court for the district of Pennsylvania. The case is stated in the opinion of the court.

Hopkinson and *Ingersoll*, for the plaintiff.

Rawle and *Lewis*, for the defendant.

*MARSHALL, C. J., delivered the opinion of the court, as [*41] follows:

The Manhattan, a neutral ship, while prosecuting the voyage insured, was captured by a belligerent cruiser, the second mate and twenty-one of the hands were taken out, and two British officers and fifteen seamen put on board, and she was ordered into a British port. The mate soon afterwards arrived in the United States in another vessel. On the 26th of February, 1805, he gave information of these facts to the owner of The Manhattan, who, on the 28th of the same month, communicated it to the insurers, and offered to abandon to them. On the 2d of April payment of the freight was demanded and refused. The Manhattan was carried into Bermuda, and libelled

as prize of war. On the 20th of April, in the same year, both vessel and cargo were acquitted. From this sentence, so far as respected the cargo only, an appeal was prayed, which does not appear to have been decided. The cargo was delivered to the owners on their giving security, and on the 8th of July the vessel and cargo arrived at the port of destination. The underwriters having refused to give counter security, this action was brought on the 6th of June, after the vessel was liberated, and before her arrival at the port of destination. The policy is on the freight.

The question referred to this court is, whether the facts stated entitle the insured to recover against the underwriters for a total loss.

In examining this question, the material points to be determined are,

1st. Had the insured a right to abandon when the offer was made?

2d. Have any circumstances since occurred which affect this right?

These are important questions to the commercial interest of the United States, and ought to be settled with as much clearness as the case admits.

[*42] *It is universally agreed, that to constitute a right to abandon, there must have existed a total loss, occasioned by one of the perils insured against; but this total loss may be real, or legal. Where the loss is real, a controversy can only respect the fact; but the circumstances which constitute a legal, or technical loss, yet remain, in many cases, open for consideration.

It has been decided that a capture, by one belligerent from another, constitutes in a technical sense of the word, a total loss, and gives an immediate right to the insured to abandon to the insurers, although the vessel may afterwards be recaptured and restored.

It has also been decided that an embargo or detention by a foreign friendly power, constitutes a total loss, and warrants an immediate abandonment. But the capture, or taking at sea of a neutral vessel by a belligerent, is a case on which the courts of England do not appear to have expressly decided, and which must depend on general principles, on analogy, and on a reasonable construction of the contract between the parties.

A capture by an enemy is a total loss, although the property be not changed, because the taking is with an intent to deprive the owner of it, and because the hope of recovery is too small, and too remote to suspend the right of the insured, in expectation of that event.

If a neutral ship be captured as enemy property, the taking is unquestionably with a design to deprive the owner of it; and the hope of recovery is in many cases remote, since it may often depend on an appellate court; and though not equally improbable as in the case

of capture by an enemy, is not so certain as is stated in argument by the counsel for the defendants.

The distinction between a capture by an enemy and by a belligerent not an enemy, has not been taken in the cases adjudged in England, so far as those cases have been laid before the court, and the best general writers seem to arrange them in the same class. 2 Marshall, 422, 435.

* It has been also determined, that a total loss existed in [* 43] the case of an embargo, or the detention of a foreign prince.

In one case cited at the bar, Salucci *v.* Johnson, (4 Dougl. 224,) the court of king's bench determined that an illegal arrest at sea amounted to a detention by a foreign prince, and although that case has since been overruled in England, so far as it decided that to resist a search did not justify a seizure, yet the principle that an arrest at sea was to be resolved into a detention by a foreign power, has not been denied. Marshall, 435, after noticing the contrary decisions respecting the right of a neutral to resist a search, adds " yet the above case of Salucci *v.* Johnson may nevertheless, I conceive, be considered as an authority to prove, that if a neutral ship be unlawfully arrested and detained by a belligerent cruiser, for any pretended offence against the law of nations, this would be a detention of princes."

That a detention of a foreign power by embargo, or otherwise, warrants an abandonment, is well settled. 2 Marshall, 483.

The opinion given by the court of king's bench in the case of Salucci *v.* Johnson, goes no further than to establish that an unlawful arrest at sea is to be considered as the detention of a foreign prince. Whether the arrest can only be considered as unlawful when the cause alleged, if true, is not in itself sufficient to justify a seizure, or when, if true, it would be sufficient, but is in reality contrary to the fact, is not stated. In point of reason, however, it would seem that when an arrest is made at sea by a person acting under the authority of a prince, the detention is as much the detention of princes in the one case as in the other.

In the case of an embargo, the detention is lawful. The right of any power to lay an embargo has not been questioned. Yet it is universally admitted, that an embargo constitutes a detention which amounts, at the time, to a total loss, and warrants an abandonment.

* In what consists the difference between a detention [* 44] occasioned by an embargo, and a detention occasioned by an arrest at sea of a neutral by a belligerent power?

An embargo is not laid with a view to deprive the owner of his

property, but the arrest is made with that view. In the first case, therefore, the property detained is not in hazard; in the last, it always is in hazard. So far the claim to abandon on an arrest is supported by stronger reason than the claim to abandon when detained by an embargo.

But it is argued that the duration of an embargo has no definite limitation, while a neutral vessel may count on being instantly discharged. Such is the rapidity of proceeding in a court of admiralty, that its mandate of restoration is figuratively said to be "borne on the wings of the wind."

Commercial contracts have but little connection with figurative language, and are seldom rightly expounded by a course of artificial reasoning. Merchants generally regard the fact itself; and if the fact be attended to, an embargo seldom continues as long as the trial of a prize cause, where an appeal is interposed. The history of modern Europe, it is believed, does not furnish an instance of an embargo of equal duration with the question whether the cargo of the Manhattan be or be not lawful prize. The reasoning of the books in the case of a capture by an enemy, and of an embargo, applies in terms, but certainly in reason, to an arrest by a belligerent, not an enemy. 2 Marshall, 483.

The reasoning of the English judges in all the cases which have been read at bar, and their decisions on the question of abandonment, have received the attention of the court. To go through those cases would protract this opinion to a length unnecessarily tedious. With respect to them, therefore, it will only be observed, that the principles laid down appear to be applicable to an arrest as well as to a capture, or detention of foreign powers; and that a distinction between an arrest and such capture or detention, has never been taken.

[*45] *The contract of insurance is said to be a contract of indemnity, and, therefore, (it is urged by the underwriters, and has been repeatedly urged by them,) the assured can only recover according to the damage he has sustained. This is true, and has uniformly been admitted. But if full compensation could only be demanded where there was an actual total loss, an abandonment could only take place where there was nothing to abandon.

There are situations in which the delay of the voyage, the deprivation of the right to conduct it, produce inconveniences to the insured, for the calculation of which the law affords, and can afford, no standard. In such cases there is, for the time, a total loss: and in this state of things the insured may abandon to the underwriter, who stands in his place, and to whom justice is done, by enabling him to receive all that the insured might receive. A capture by an enemy,

and an embargo by a foreign power, are admitted to be within this rule, and a complete arrest by a belligerent not an enemy, seems, in reason, to be equally within it.

It is, therefore, the unanimous opinion of the court, that where, as in this case, there is a complete taking at sea by a belligerent, who has taken full possession of the vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, a total loss, and the act of abandonment vests the right to the thing abandoned in the underwriters, and the amount of insurance in the assured.

2. Have any circumstances occurred since the abandonment, which have converted this total, into a partial loss?

Without reviewing the conduct of the assured subsequent to that period, it will be sufficient to observe that he has performed no act, which can be construed into a relinquishment of the right, which was vested in him, by the offer to abandon.

It only remains, then, to inquire whether the release and return of the Manhattan deprives the assured of *the right [*46] to resort to the underwriters for a total loss, which was given by the abandonment.

This point has never been decided in the courts of England.

In the case of Hamilton *v.* Mendez, 2 Burr. 1198, Lord Mansfield leaves it completely undetermined, whether the state of loss at the time the abandonment is made, or at the time of action brought, or at the time of the verdict rendered, shall fix the right to recover for a partial or a total loss.

A majority of the judges are of opinion that the state of loss at the time of the abandonment must fix the rights of the parties to recover on an action afterwards brought; and the judge who doubts respecting it, is of opinion that, in this case, counter security having been refused by the underwriters, the question of freight is yet suspended.

It is to be certified to the circuit court of Pennsylvania, that in the case stated for the opinion of this court, the plaintiff is entitled to recover for a total loss.

4 C. 202; 3 W. 183; 12 P. 378.

MONTALET v. MURRAY.

4 C. 46.

The courts of the United States have not jurisdiction between aliens.
It must appear upon the record that the character of the parties supports the jurisdiction.
Under the 11th section of the Judiciary Act, (1 Stats. at Large, 78,) if the payee and maker of a promissory note were both aliens, the indorsee cannot sue in the courts of the United States.
If a judgment is reversed for want of jurisdiction, costs are not given.

ERROR to the circuit court of the United States for the district of Georgia. The action was by a citizen of the State of New York, against an alien, as maker of sundry promissory notes payable to another alien, and indorsed to the plaintiff.

The court was unanimously of opinion that the courts of the United States have no jurisdiction of cases between aliens.

[* 47] MARSHALL, C. J., said, that if it did not appear upon the record that the character of the original parties would support the jurisdiction, that objection was equally fatal, under the uniform decisions of this court.

Judgment reversed for want of jurisdiction, and with costs, under the authority of Winchester v. Jackson,[1] at last term.

But on the last day of the term, the court gave the following general directions to the clerk.

That in cases of reversal, costs do not go of course, but in all cases of affirmance they do. And that when a judgment is reversed for want of jurisdiction, it must be without costs.

2 H. 9; 5 H. 278; 13 H. 183; 19 H. 393.

[* 48] *THE UNITED STATES v. WILLINGS and FRANCIS.

4 C. 48.

If part of a vessel be sold by parol while at sea, and resold to the vendor on her arrival in port and before entry, she does not lose her American character, and no new register is necessary.
If a vessel be sold at sea to an American citizen, she is not forfeited thereby. On her arrival in port she is an American vessel, and a new register cannot, and need not be taken, till the old one is surrendered.

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[1] 3 C. 514.

ERROR to the circuit court of the United States for the district of Pennsylvania. The action was debt on a bond given for duties, instituted in the district court. A parol sale of part of a vessel had been made while at sea, and a resale to the vendors after her arrival in port, but before entry. The question raised appears in the opinion of the court.

Rodney, attorney-general, for the United States.

Lewis, for the defendants.

*MARSHALL, C. J., delivered the opinion of the court. [* 55]

The single question in this case is, whether an American registered vessel, in part transferred by parol while at sea to an American citizen, and resold to the original owners on her return into port, before her entry, does by that operation lose her privileges as an American bottom, and become subject to foreign duties.

This question depends on the "Act concerning the registering and recording of ships and vessels,"[1] and more particularly on the 14th and 17th sections of that act.

In construing the 14th section, much depends on the true legislative meaning of the word "when." The plaintiffs in error contend that it designates the precise time when a particular act must be performed in order to save a forfeiture; the defendants insist that it describes the occurrence which shall render that particular act necessary. That the term may be used, and, either in law or in common parlance, is frequently used, in the one or the other of these senses, cannot be controverted; and, of course, the context must decide in which sense it is used in the law under consideration.

The particular act to be performed in order to save the forfeiture of the American character, and the privileges attached to it, is the obtaining a new register; and the first inquiry is, whether this new register must be obtained at the time of transfer, or at some other convenient time on the event of a transfer.

This would seem to the court scarcely to admit of a doubt. It has been correctly argued that the precise *time to regis- [* 56] ter the vessel anew cannot be prescribed by the word "when," because the direction does not follow that word in the sentence so as to be limited by it with respect to time. It is not said that when a registered vessel shall be transferred or altered, she shall obtain a new register or cease to be an American vessel, but the

[1] 1 Stats. at Large, 294, 295.

continuity of the sentence is broken by interposing the words "in every such case," thereby clearly making the forfeiture to depend on the failure to register on the event described, not on the failure to register at the precise time when the event described occurs.

This observation also applies to a subsequent part of the section, where the forfeiture is repeated, and depends on the failure to register, not on the failure to register at the precise time of transfer.

But this construction, which is the fair and natural exposition of the words themselves, is rendered still more obviously necessary by the nature of the case, and by the context.

No man will contend that the transfer or the change in a vessel, and the obtaining a new register, are to be simultaneous. The one must precede the other, and unless the transfer, or the repairs and alterations of the hulk or rigging are in all cases to be made in the office from which the new register is to be obtained, a reasonable interval between these acts must be allowed. This reasonable interval will depend on the nature of the case.

When must a new register be obtained for a vessel which has been altered or partially transferred to a citizen while at sea? The act answers, at the time of delivering up her former certificate of registry. And when can this former certificate be delivered up? Certainly not till the return of the vessel, for the certificate is a paper necessary to the vessel, and is, therefore, always retained on board while at sea.

This construction is really so obvious and inevitable, that the endeavor to make it more clear would seem to be a total misapplication of time.

[* 57] *The question, at what time the new register is to be obtained, and at what time the vessel shall be affected by the failure to obtain it, is susceptible of rather more doubt. There is no impossibility in obtaining a new register before entry, and the necessity of doing so must depend upon the words of the act, and upon the nature of the case.

It is obvious that on her arrival in port, The Missouri was an American vessel, and her cargo, when imported into the United States, was liable to the duties imposed on American, not on foreign bottoms. This is the clear consequence of establishing that a new register was not required before the arrival of the vessel.

If, then, the cargo, when imported, was liable only to the duties on goods imported in an American bottom, it would certainly require plain words to charge them, on any subsequent failure, with higher duties.

If the words of the section be examined, they are, as has been stated at the bar, prospective, not retrospective. They operate on

future, not on past transactions. "The vessel shall be registered anew, (otherwise she shall cease to be deemed a ship or vessel of the United States.") That is, she shall cease after the lapse of the time when she ought to have been registered anew. But before that time had elapsed, she had, as an American vessel, actually imported a cargo whose liability to duties had commenced.

So in the subsequent clause: "And in every case in which a ship or vessel is hereby required to be registered anew, if she shall not be so registered anew, she shall not be entitled to any of the privileges or benefits of a ship or vessel of the United States." That is, her future earnings shall not be attended with the advantages annexed to American bottoms.

This construction derives some corroboration from the 17th section. This section provides for the oath which is to be taken by an owner on the entry of an American vessel. "That upon the entry of every ship," &c.

*If upon the entry the owner shall refuse to take this oath, [* 58] the vessel loses the privileges of an American bottom. If he takes it, and the oath discloses no fact which has already forfeited those privileges, she retains them. It is observable, that in order to retain them she is not required to take out a new register if an alienation has been made, and this strengthens the idea that if such an alienation be not in itself a forfeiture, a new register cannot be requisite so far as respects the voyage already concluded.

In the case of alienation to a foreigner, the privileges of an American bottom are *ipso facto* forfeited; but in the case of an alienation to a citizen they are not forfeited until after she ought to have been registered anew, and the oath which entitles her to enter as an American bottom does not require such new register.

But it has been argued that the omission to execute a bill of sale in writing at the time of sale is in itself a forfeiture of the American character.

The words of the act are: "And in every such case of sale or transfer," &c.

These words attach to the omission the penalty which the law annexes to it, and no other can be inflicted. This is not that the vessel shall lose her American character, but that she shall be incapable of being registered anew. The bill of sale, therefore, can only be required when the new register is to be obtained, and if it be then produced, the new register cannot be refused.

An opinion has already been indicated, that in the case of a transfer or alienation at sea, a new register is not necessary to protect from alien duties the vessel which arrives, and the cargo which was

actually imported while the old register was in full force. But it is the opinion of the court that in the case under consideration no new register was requisite.

The new register must be in every thing but its date a precise copy of the old one. The oath to be administered on the entry [* 59] could be truly and fairly taken. The *names of all the persons who were at the time owners of the vessel were in the old register. The intermediate alienation and repurchase of part of the vessel had worked no forfeiture, and had created no necessity for a new register. The parties to whom the alienation had been made, not having property in the vessel at the time of entry, could not have taken the oath prescribed by law, which is in the present tense, and refers to the actual state of the property at the time of entry; nor could a new register have issued to them, in order to be delivered up for the purpose of making out another register for the original owners, who had become the present owners, without departing from the truth of the case, because the register also speaks in the present tense, and must recite the names of those who are the real owners at its date. Any new register which could have issued must have been, except in date, a duplicate of the old one, and must have been perfectly useless. Suppose the ship had been altered in a foreign port, but before her arrival and entry had resumed the form and dimensions mentioned in her old register, would it be pretended that a new register was necessary? What would such new register be but a copy of the old one? It is believed that in such a case it would not be suspected that any forfeiture of the old register, or any necessity for a new one, was produced, and between the two cases there appears to be no difference made by the letter or the spirit of the act.

The court is, therefore, unanimously of opinion, that the sentence of the circuit court be affirmed.

Judgment affirmed.

4 H. 131.

[* 60] *ONEAL *v.* LONG.

4 C. 60.

If an appeal bond executed by the appellant and one surety be rejected by a justice of the peace, and afterwards, without the privity of the surety the bond is altered by interlining the name of another surety, who executes it, the plea of *non est factum*, by the principal obligor, is supported.

ERROR to the circuit court for the District of Columbia. The action was debt on an appeal bond. The question was whether the court erred in refusing to give the jury the following instruction prayed for: "that if they should be satisfied by the evidence that the bonds were signed, sealed and delivered by Mary Sweeny, as principal, and I. T. Frost and the defendant as her sureties, and were afterwards presented to C. C., (the justice who had rendered the judgments,) for his approbation and acceptance of the securities, and were by him refused and rejected, and after such rejection were interlined, without the license, privity, and knowledge of the defendant, by inserting the name of Lund Washington, as a coöbligor, who on the succeeding day, without the privity, knowledge, and consent of the defendant, signed, sealed, and delivered the bonds, which were afterwards approved of by the justice, that then such interlineation and execution of said bonds, by Lund Washington, rendered them void as to the defendant, and the plaintiff cannot recover in this suit."

P. B. Key, for plaintiff.

Mason, for defendant.

*MARSHALL, C. J., delivered the opinion of the court, that [*62] there was error in this, that the court below did not instruct the jury as prayed by the defendant. He observed, that the judges did not all agree upon the same grounds, some being of opinion that the bonds were void by reason of the interlineation, and others that they were vacated by the rejection of them by the magistrate, and could not be set up again without a new delivery.

Judgment reversed, with costs.

SMITH, and others *v.* CARRINGTON, and others.

4 C. 62.

If evidence is illegally admitted, this court cannot inquire into its weight or importance, but must reverse the judgment.

The court cannot be required to give to the jury an opinion, involving matter of fact, and when such a request is made, is not bound to separate the law from the fact and instruct on the former, though it may be proper to do so.

A misdirection contained in the charge of the judge, is a subject of a bill of exceptions.

ERROR to the circuit court of the United States for the district of Rhode Island. The action was assumpsit for a balance of account, and one of the items of debit was a charge for money paid for insuring a vessel and cargo of the defendant. The questions, and the material facts, appear in the opinion of the court.

Robbins and *Key*, for the plaintiff.

Ingersoll, for the defendant.

[* 69] * MARSHALL, C. J., delivered the opinion of the court.

This case comes up on exceptions to certain opinions given by the judges of the circuit court of Rhode Island, at the trial of the cause before them.

The first exception is to the admission of Peleg Remington as a witness.

This exception appeared to be abandoned by the counsel in reply, and is, indeed, so perfectly untenable, that the court will only observe, that Peleg Remington does not appear to have been interested in the event of the cause in which he deposed, but certainly was not interested in the particular fact to which he was required to depose, and was, therefore, clearly a competent witness.

[* 70] * The second exception is taken to the opinion of the court admitting as evidence a paper purporting to be the copy of a letter written by the defendant, Carrington, to Smith & Ridgeway, of Philadelphia, the correspondents of the plaintiffs, and also a letter from Smith & Ridgeway to the defendant, Carrington, purporting to be an answer to the said letter.

To the admission of the letter of Smith & Ridgeway no just objection appears. The verity of that letter is acknowledged on the face of the bill of exceptions, and no cause is stated why it should not have been read to the jury. But the admission of the copy of a letter written by one of the defendants stands upon totally different ground.

To introduce into a cause the copy of any paper, the truth of that copy must be established, and sufficient reasons for the non-production of the original must be shown.

If in this case the answer of Smith & Ridgeway had authenticated the whole letter of Carrington, the copy of that letter need not have been offered, since its whole contents would have been proved by the answer to it. If its whole contents were not proved by the answer, then the part not so proved was totally unauthenticated, and may have formed no part of the original letter. In this case, the answer cannot have authenticated the copy, because the bill states that the defendants gave no proof of its being true. This copy, therefore, not being proved to be a true copy, ought not to have gone before the jury. Into its importance or operation this court cannot inquire. It was improper testimony, and a verdict founded on improper testimony cannot stand.

For this error the judgment must be reversed, and the cause remanded to the circuit court of Rhode Island, to be again tried.

The third exception is taken to the refusal of the court to give an opinion on a question stated by the counsel for the plaintiffs. The difficulty of deciding on this exception does not arise from any doubt which *ought to have been produced by the [* 71] facts in the cause, but from the manner in which the question was propounded to the court.

After a long and complex statement of the testimony, the counsel for the plaintiffs requested the court to declare whether, "if the plaintiffs had actually paid the said premium to the underwriters, before any notice of the change of the destination of the ship, they had a right, under the circumstances of the case, to recover the same of the defendants."

To this question the court refused to give an answer.

There can be no doubt of the right of a party to require the opinion of the court on any point of law which is pertinent to the issue, nor that the refusal of the court to give such opinion furnishes cause for an exception; but it is equally clear that the court cannot be required to give to the jury an opinion on the truth of testimony in any case.

Had the plaintiffs' counsel been content with the answer of the court to the question of law, he would have been entitled to that answer; but when he involved facts with law, and demanded the opinion of the court on the force and truth of the testimony, by adding the words "under the circumstances of the case," the question is so qualified as to be essentially changed; and although the court might with propriety have separated the law from the fact, and have stated the legal principle, leaving the fact to the jury, there was no obligation to make this discrimination, and, consequently, no error was committed in refusing to answer the question propounded.

The record also exhibits a part of the charge given to the jury, on which the counsel for the plaintiffs have argued as if it composed a part of the bill of exceptions. It is in these words: "And the said court, prior to the request last mentioned, did declare and give their opinion to said jury, that the case wholly turned upon the point whether or not the said defendants *had given due [* 72] and seasonable notice of the change of the destination of said ship. That it was a question proper for the said jury to decide, whether such due and seasonable notice had been given; and that if they were of opinion it had been so given, on considering the whole of the evidence, they ought not to allow the plaintiffs' said charge for said premium."

That a party has a right to except to a misdirection of the jury

contained in the charge of the judge who tries the cause, is settled in this court.[1]

That the opinion which the record ascribes to the judge in this case is incorrect, unless some other part of the charge shall have so explained it as to give to the words a meaning different from that which is affixed to them taken by themselves, is the opinion of this court.

The judges instructed the jury, "that the case wholly turned upon the point whether or not the defendants had given due and seasonable notice of the change of the destination of the said ship," and that if they were of opinion that due and seasonable notice had been given, they ought to find against the plaintiffs, on the question of their right to recover the premium advanced by them for the defendants.

Due and seasonable notice must have been given as soon after the destination of the vessel was changed as it could have been given, whether the premium had or had not been advanced by the plaintiffs before they received it; or this direction must have left it to the jury to determine whether notice was or was not due and seasonable, although it might have not been received by the plaintiffs before they had actually advanced for the defendants the sum in contest.

On the first exposition, these words would amount to a clear misdirection of the jury; because, if the plaintiffs had paid to the underwriters, at the request of the defendants, the premium of insurance, before they received notice countermanding the directions to make such payment, the right given by subsequent circumstances

[* 73] * to the insured to demand its return from the underwriters, could not affect the claim of the plaintiffs on the defendants for money fairly advanced by them for the use of the defendants.

If the latter construction be adopted, there was still a misdirection on the part of the court. The judge ought not to have left it expressly to the jury to decide, whether notice given immediately after the change of the destination of the vessel could be due and seasonable notice, unless it was received before the premium was advanced.

It is, however, not material to the present cause to determine, whether this exception does or does not exhibit a misdirection to the jury, since we are unanimously of opinion, that for admitting a paper purporting to be the copy of a letter from Edward Carrington to Smith & Ridgeway, to go to the jury, which was not proved to be a copy, the judgment must be reversed.

Judgment reversed.

[1] Church v. Hubbart, 2 C. 239.

Pendleton and Webb *v.* Wambersie, et al.

4 C. 73.

An assignee of one copartner, may maintain a bill for an account, against the other partners and the agent of the partnership, which was formed to deal in lands.

Appeal from the circuit court of the United States for the district of Georgia. The bill stated the formation of a partnership to buy and sell lands; that through an agent, sundry lands of the firm had been sold, and others were still held by or on account of the partnership; that one of the partners had by deed assigned his interest in the concern to one McQueen, who assigned it to the complainants. It made the other partners and the agent parties, and prayed for an account.

The defendants demurred for want of equity in the bill, and the court below sustained the demurrer, and decreed that the bill be dismissed, with costs.

But this court, without argument, overruled the demurrer, reversed the decree, and remanded the cause for further proceedings.

Ex parte Bollman and *Ex parte* Swartwout. [*75]

4 C. 75.

Under the 14th section of the Judiciary Act, (1 Stats. at Large, 81,) this court has power to issue a writ of *habeas corpus* to examine into the cause of a commitment by the circuit court for the District of Columbia.

It is the revision of a decision of an inferior court, confining a person for trial, and therefore is the exercise of appellate jurisdiction.

To constitute treason war must be actually levied.

A conspiracy to subvert the government by force, is not treason.

If a body of men be actually assembled for the purpose of effecting by force a treasonable design, all who perform any part, however minute, and however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors.

The mere enlistment of men, who are not assembled, is not a levying of war.

An affidavit made before one magistrate may justify a commitment by another.

If an offence be committed on land, the offender must be tried by the court having jurisdiction over that territory where the offence was committed.

C. Lee moved for a *habeas corpus* to the marshal of the District of Columbia, to bring up the body of Samuel Swartwout, who had

been committed by the circuit court of that district, on the charge of treason against the United States; and for a *certiorari* to bring up the record of the commitment, &c.

And on a subsequent day, *Harper* made a similar motion in behalf of Erick Bollman, who had also been committed by the same court on a like charge.[1]

[*76] *The order of the court below, for their commitment, was in these words:

"The prisoners, Erick Bollman and Samuel Swartwout, were brought up to court in custody of the marshal, arrested on a charge of treason against the United States, on the oaths of General James Wilkinson, General William Eaton, James L. Donaldson, Lieutenant William Wilson, and Ensign W. C. Mead, and the court went into further examination of the charge: Whereupon it is ordered, that the said Erick Bollman and Samuel Swartwout be committed to the prison of this court, to take their trial for treason against the United States, by levying war against them, to be there kept in safe custody until they shall be discharged in due course of law."

The oaths referred to in the order for commitment, were affidavits in writing, and were filed in the court below.

[*93] *MARSHALL, C. J.,[2] delivered the opinion of the court.

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[1] On a former day, (Feb. 5,) *C. Lee* had made a motion for a *habeas corpus* to a military officer to bring up the body of James Alexander, an attorney at law at New Orleans, who, as it was said, had been seized by an armed force under the orders of General Wilkinson, and transported to the city of Washington.

CHASE, J. then wished the motion might lay over to the next day. He was not prepared to give an opinion. He doubted the jurisdiction of this court to issue a *habeas corpus* in any case.

JOHNSON, J. doubted whether the power given by the act of congress, of issuing the writ of *habeas corpus*, was not intended as a mere auxiliary power to enable courts to exercise some other jurisdiction given by law. He intimated an opinion that either of the judges at his chambers might issue the writ, although the court collectively could not.

CHASE, J. agreed that either of the judges might issue the writ, but not out of his peculiar circuit.

MARSHALL, C. J. The whole subject will be taken up *de novo*, without reference to precedents. It is the wish of the court to have the motion made in a more solemn manner to-morrow, when you may come prepared to take up the whole ground. [But in the mean time Mr. Alexander was discharged by a judge of the circuit court.]

[2] The only judges present when these opinions were given were, MARSHALL, C. J., WASHINGTON, JOHNSON, and LIVINGSTON, Justices. CUSHING, J. and CHASE, J. were prevented by ill health from attending.

As preliminary to any investigation of the merits of this motion, this court deems it proper to declare that it disclaims all jurisdiction not given by the constitution, or by the laws of the United States.

Courts which originate in the common law possess a jurisdiction which must be regulated by the common law, until some statute shall change their established principles; but courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction. It is unnecessary to state the reasoning on which this opinion is founded, because it has been repeatedly given by this court; and with the decisions heretofore rendered on this point, no member of the bench has, even for an instant, been dissatisfied. The reasoning from the bar in relation to it, may be answered by the single observation, that for the meaning *of the term *habeas corpus*, resort [*94] may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law.

This opinion is not to be considered as abridging the power of courts over their own officers, or to protect themselves and their members from being disturbed in the exercise of their functions. It extends only to the power of taking cognizance of any question between individuals, or between the government and individuals.

To enable the court to decide on such question, the power to determine it must be given by written law.

The inquiry, therefore, on this motion will be, whether by any statute compatible with the constitution of the United States, the power to award a writ of *habeas corpus*, in such a case as that of Erick Bollman and Samuel Swartwout, has been given to this court.

The 14th section of the Judiciary Act[1] has been considered as containing a substantive grant of this power.

It is in these words: "That all the before-mentioned courts of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law. And that either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus*, for the purpose of an inquiry into the cause of commitment. Provided, that writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the

[1] 1 Stats. at Large, 81.

authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

[*95] *The only doubt of which this section can be susceptible is, whether the restrictive words of the first sentence limit the power to the award of such writs of *habeas corpus* as are necessary to enable the courts of the United States to exercise their respective jurisdictions in some causes which they are capable of finally deciding.

It has been urged, that in strict grammatical construction, these words refer to the last antecedent, which is, "all other writs not specially provided for by statute."

This criticism may be correct, and is not entirely without its influence; but the sound construction which the court thinks it safer to adopt, is, that the true sense of the words is to be determined by the nature of the provision, and by the context.

It may be worthy of remark, that this act was passed by the first congress of the United States, sitting under a constitution which had declared "that the privilege of the writ of *habeas corpus* should not be suspended, unless when, in cases of rebellion or invasion, the public safety might require it."

Acting under the immediate influence of this injunction, they must have felt, with peculiar force, the obligation of providing efficient means by which this great constitutional privilege should receive life and activity; for if the means be not in existence, the privilege itself would be lost, although no law for its suspension should be enacted. Under the impression of this obligation, they give to all the courts the power of awarding writs of *habeas corpus*.

It has been truly said that this is a generic term, and includes every species of that writ. To this it may be added, that when used singly — when we say the writ of *habeas corpus*, without addition, we most generally mean that great writ which is now applied for; and in that sense it is used in the constitution.

[*96] *The section proceeds to say, that "either of the justices of the supreme court, as well as judges of the district courts, shall have power to grant writs of *habeas corpus* for the purpose of an inquiry into the cause of commitment."

It has been argued that congress could never intend to give a power of this kind to one of the judges of this court, which is refused to all of them when assembled.

There is certainly much force in this argument, and it receives additional strength from the consideration, that if the power be denied to this court, it is denied to every other court of the United States;

the right to grant this important writ is given, in this sentence, to every judge of the circuit, or district court, but can neither be exercised by the circuit nor district court. It would be strange if the judge, sitting on the bench, should be unable to hear a motion for this writ where it might be openly made, and openly discussed, and might yet retire to his chamber, and in private receive and decide upon the motion. This is not consistent with the genius of our legislation, nor with the course of our judicial proceedings. It would be much more consonant with both, that the power of the judge at his chambers should be suspended during his term, than that it should be exercised only in secret.

Whatever motives might induce the legislature to withhold from the supreme court the power to award the great writ of *habeas corpus*, there could be none which would induce them to withold it from every court in the United States; and as it is granted to all in the same sentence and by the same words, the sound construction would seem to be, that the first sentence vests this power in all the courts of the United States; but as those courts are not always in session, the second sentence vests it in every justice or judge of the United States.

The doubt which has been raised on this subject may be further explained by examining the character of the various writs of *habeas corpus*, and selecting those to which this general grant of power must be restricted, if taken in the limited sense of being merely used to enable * the court to exercise its jurisdiction in causes [*97] which it is enabled to decide finally.

The various writs of *habeas corpus*, as stated and accurately defined by Judge Blackstone, (3 Bl. Com. 129,) are, 1st. The writ of *habeas corpus ad respondendum*, "When a man hath a cause of action against one who is confined by the process of some inferior court; in order to remove the prisoner and charge him with this new action in the court above."

This case may occur when a party, having a right to sue in this court, (as a State at the time of the passage of this act, or a foreign minister,) wishes to institute a suit against a person who is already confined by the process of an inferior court. This confinement may be either by the process of a court of the United States, or of a state court. If it be in a court of the United States, this writ would be inapplicable, because perfectly useless, and consequently, could not be contemplated by the legislature. It would not be required, in such case, to bring the body of the defendant actually into court, and he would already be in the charge of the person who, under an original writ from this court, would be directed to take him into custody, and would already be confined in the same gaol in which he

would be confined under the process of this court, if he should be unable to give bail.

If the party should be confined by process from a state court, there are many additional reasons against the use of this writ in such a case.

The state courts are not, in any sense of the word, inferior courts, except in the particular cases in which an appeal lies from their judgment to this court; and in these cases the mode of proceeding is particularly prescribed, and is not by *habeas corpus*. They are not inferior courts, because they emanate from a different authority, and are the creatures of a distinct government.

2d. The writ of *habeas corpus ad satisfaciendum*, "When a prisoner hath had judgment against him in an action, and the plain-
[*98] tiff is desirous to bring him up to *some superior court to charge him with process of execution."

This case can never occur in the courts of the United States. One court never awards execution on the judgment of another. Our whole juridical system forbids it.

3d. *Ad prosequendum, testificandum, deliberandum*, &c. "Which issue when it is necessary to remove a prisoner, in order to prosecute, or bear testimony, in any court, or to be tried in the proper jurisdiction wherein the fact was committed."

This writ might unquestionably be employed to bring up a prisoner to bear testimony in a court, consistently with the most limited construction of the words in the act of congress; but the power to bring a person up that he may be tried in the proper jurisdiction, is understood to be the very question now before the court.

4th, and last. The common writ *ad faciendum et recipiendum*, "Which issues out of any of the courts of Westminster Hall, when a person is sued in some inferior jurisdiction, and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer, (whence the writ is frequently denominated a *habeas corpus cum causâ*,) to do and receive whatever the king's court shall consider in that behalf. This writ is grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below."

Can a solemn grant of power to a court to award a writ be considered as applicable to a case in which that writ, if issuable at all, issues by law without the leave of the court?

It would not be difficult to demonstrate that the writ of *habeas corpus cum causâ* cannot be the particular writ contemplated by the legislature in the section under consideration; but it will be sufficient to observe generally, that the same act prescribes a different

mode for bringing into the courts of the United States suits brought in a * State court against a person having a right to [*99] claim the jurisdiction of the courts of the United States. He may, on his first appearance, file his petition and authenticate the fact, upon which the cause is *ipso facto* removed into the courts of the United States.

The only power, then, which, on this limited construction, would be granted by the section under consideration, would be that of issuing writs of *habeas corpus ad testificandum*. The section itself proves that this was not the intention of the legislature. It concludes with the following proviso, "That writs of *habeas corpus* shall in no case extend to prisoners in gaol, unless where they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify."

This proviso extends to the whole section. It limits the powers previously granted to the courts, because it specifies a case in which it is particularly applicable to the use of the power by courts — where the person is necessary to be brought into court to testify. That construction cannot be a fair one which would make the legislature except from the operation of a proviso, limiting the express grant of a power, the whole power intended to be granted.

From this review of the extent of the power of awarding writs of *habeas corpus*, if the section be construed in its restricted sense; from a comparison of the nature of the writ which the courts of the United States would, on that view of the subject, be enabled to issue; from a comparison of the power so granted with the other parts of the section, it is apparent that this limited sense of the term cannot be that which was contemplated by the legislature.

But the 33d section[1] throws much light upon this question. It contains these words: "And upon all arrests in criminal cases, bail shall be admitted, except where the punishment may be death; in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district * court who shall exercise their discretion therein, regarding [*100] the nature and circumstances of the offence, and of the evidence, and of the usages of law."

The appropriate process of bringing up a prisoner, not committed by the court itself, to be bailed, is by the writ now applied for. Of consequence, a court possessing the power to bail prisoners not committed by itself, may award a writ of *habeas corpus* for the exercise

[1] 1 Stats. at Large, 91.

of that power. The clause under consideration obviously proceeds on the supposition that this power was previously given, and is explanatory of the 14th section.

If, by the sound construction of the act of congress, the power to award writs of *habeas corpus* in order to examine into the cause of commitment is given to this court, it remains to inquire whether this be a case in which the writ ought to be granted.

The only objection is, that the commitment has been made by a court having power to commit and to bail.

Against this objection the argument from the bar has been so conclusive that nothing can be added to it.

If, then, this were *res integra*, the court would decide in favor of the motion. But the question is considered as long since decided. The case of Hamilton is expressly in point in all its parts; and although the question of jurisdiction was not made at the bar, the case was several days under advisement, and this question could not have escaped the attention of the court. From that decision the court would not lightly depart. United States *v.* Hamilton, 3 Dall. 17.

If the act of congress gives this court the power to award a writ of *habeas corpus* in the present case, it remains to inquire whether that act be compatible with the constitution.

In the *mandamus* case, *ante*, vol. 1, p. 175, Marbury *v.* Madison, it was decided that this court would not exercise original jurisdiction except so far as that jurisdiction was given by the constitu-
[* 101] tion. But so far as that *case has distinguished between original and appellate jurisdiction, that which the court is now asked to exercise is clearly appellate. It is the revision of a decision of an inferior court, by which a citizen has been committed to gaol.

It has been demonstrated at the bar, that the question brought forward on a *habeas corpus*, is always distinct from that which is involved in the cause itself. The question whether the individual shall be imprisoned is always distinct from the question whether he shall be convicted or acquitted of the charge on which he is to be tried, and, therefore, these questions are separated, and may be decided in different courts.

The decision that the individual shall be imprisoned must always precede the application for a writ of *habeas corpus*, and this writ must always be for the purpose of revising that decision, and, therefore, appellate in its nature.

But this point also is decided in Hamilton's case and in Burford's case.

If at any time the public safety should require the suspension of

the powers vested by this act in the courts of the United States, it is for the legislature to say so.

That question depends on political considerations, on which the legislature is to decide. Until the legislative will be expressed, this court can only see its duty, and must obey the laws.

The motion, therefore, must be granted.

JOHNSON, J. In this case I have the misfortune to dissent from the majority of my brethren. As it is a case of much interest, I feel it incumbent upon me to assign the reasons upon which I adopt the opinion that this court has not authority to issue the writ of *habeas corpus* now moved for. The prisoners are in confinement under a commitment ordered by the superior *court of [* 102] the District of Columbia, upon a charge of high treason. This motion has for its object their discharge or admission to bail, under an order of this court, as circumstances upon investigation shall appear to require. The attorney-general having submitted the case without opposition, I will briefly notice such objections as occur to my mind against the arguments urged by the counsel for the prisoners.

Two questions were presented to the consideration of the court.

1st. Does this court possess the power generally of issuing the writ of *habeas corpus?*

2d. Does it retain that power in this case after the commitment by the district court of Columbia?

In support of the affirmative of the first of these questions, two grounds were assumed.

1st. That the power to issue this writ was necessarily incident to this court, as the supreme tribunal of the union.

2dly. That it is given by statute, and the right to it has been recognized by precedent.

On the first of these questions it is not necessary to ponder long; this court has uniformly maintained that it possesses no other jurisdiction or power than what is given it by the constitution and laws of the United States, or is necessarily incident to the exercise of those expressly given.

Our decision must, then, rest wholly on the due construction of the constitution and laws of the Union, and the effect of precedent, a subject which certainly presents much scope for close legal inquiry, but very little for the play of a chastened imagination.

The first section of the third article of the constitution vests the judicial power of the United States in one supreme court, and in such inferior courts as the congress *may from time [* 103]

to time establish. The second section declares the extent of that power, and distinguishes its jurisdiction into original and appellate.

The original jurisdiction of this court is restricted to cases affecting ambassadors or other public ministers, and consuls, and those in which a State shall be a party. In all other cases within the judicial powers of the Union, it can exercise only an appellate jurisdiction. The former it possesses independently of the will of any other constituent branch of the general government. Without a violation of the constitution, that division of our jurisdiction can neither be restricted or extended. In the latter its powers are subjected to the will of the legislature of the Union, and it can exercise appellate jurisdiction in no case, unless expressly authorized to do so by the laws of congress. If I understand the case of Marbury *v.* Madison, it maintains this doctrine in its full extent. I cannot see how it could ever have been controverted.

It is incumbent, then, I presume, on the counsel, in order to maintain their motion, to prove that the issuing of this writ is an act within the power of this court in its original jurisdiction, or that, in its appellate capacity, the power is expressly given by the laws of congress.

This it is attempted to do, by the fourteenth and thirty-third sections of the Judiciary Act, and the cases of Hamilton and Burford, which occurred in this court, the former in 1795, the latter in 1806.

How far their position is supported by that act and those cases, will now be the subject of my inquiry.

With a very unnecessary display of energy and pathos, this court has been imperatively called upon to extend to the prisoners the benefit of precedent. I am far, very far, from denying the general authority of adjudications. Uniformity in decisions is often as important as their abstract justice. But I deny that a court is precluded from the right, or exempted from the necessity, of examining into [* 104] the correctness or consistency of its own *decisions, or those of any other tribunal. If I need precedent to support me in this doctrine, I will cite the example of this court, which, in the case of The United States *v.* Moore, February, 1805, acknowledged that in the case of The United States *v.* Sims, February, 1803, it had exercised a jurisdiction it did not possess. Strange indeed would be the doctrine, that an inadvertency once committed by a court shall ever after impose on it the necessity of persisting in its error. A case that cannot be tested by principle is not law, and in a thousand instances have such cases been declared so by courts of justice.

The claim of the prisoners, as founded on precedent, stands thus: The case of Hamilton was strikingly similar to the present. The pri-

soner had been committed by order of the district judge on a charge of high treason. A writ of *habeas corpus* was issued by the supreme court, and the prisoner bailed by their order. The case of Burford was also strictly parallel to the present; but the writ in the latter case having been issued expressly on the authority of the former, it is presumed that it gives no additional force to the claim of the prisoners, but must rest on the strength of the case upon which the court acted.

It appears to my mind that the case of Hamilton bears upon the face of it evidence of its being entitled to little consideration, and that the authority of it was annihilated by the very able decision in Marbury *v.* Madison. In this case it was decided that congress could not vest in the supreme court any original powers beyond those to which this court is restricted by the constitution. That an act of congress vesting in this court the power to issue a writ of *mandamus* in a case not within their original jurisdiction, and in which they were not called upon to exercise an appellate jurisdiction, was unconstitutional, and void. In the case of Hamilton the court does not assign the reasons on which it founds its decision, but it is fair to presume that they adopted the idea which appears to have been admitted by the district attorney in his argument, to wit, that this court possessed a concurrent power with the district court in admitting to bail. Now a concurrent power in such a case must be an original power, *and the principle in Marbury *v.* Mad- [* 105] ison applies as much to the issuing of a *habeas corpus* in a case of treason, as to the issuing of a *mandamus* in a case not more remote from the original jurisdiction of this court. Having thus disembarrassed the question from the effect of precedent, I proceed to consider the construction of the two sections of the Judiciary Act above referred to.

It is necessary to premise that the case of treason is one in which this court possesses neither original nor appellate jurisdiction. The 14th section of the Judiciary Act, so far as it has relation to this case, is in these words: "All the before-mentioned courts (of which this is one) of the United States shall have power to issue writs of *scire facias*, *habeas corpus*, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." I do not think it material to the opinion I entertain, what construction is given to this sentence. If the power to issue the writs of *scire facias* and *habeas corpus* be not restricted to the cases within the original or appellate jurisdiction of this court, the case of Marbury and Madison rejects the clause as unavailing; and if it relate only to

cases within their jurisdiction, it does not extend to the case which is now moved for. But it is impossible to give a sensible construction to that clause without taking the whole together; it consists of but one sentence, intimately connected throughout, and has for its object the creation of those powers which probably would have vested in the respective courts without statutory provision, as incident to the exercise of their jurisdiction. To give to this clause the construction contended for by counsel, would be to suppose that the legislature would commit the absurd act of granting the power of issuing the writs of *scire facias* and *habeas corpus*, without an object or end to be answered by them. This idea is not a little supported by the next succeeding clause, in which a power is vested in the individual judges to issue the writ of *habeas corpus*, expressly for the purpose of inquiring into the cause of commitment. That part of the 33d section of the Judiciary Act which relates to this subject is [*106] in the following words: "And *upon all arrests in criminal cases, bail shall be admitted, except where the punishment is death, in which cases it shall not be admitted but by the supreme or a circuit court, or by a justice of the supreme court, or a judge of a district court, who shall exercise their discretion therein, regarding the nature and circumstances of the offence, and of the evidence, and usage of law."

On considering this act it cannot be denied that if it vests any power at all, it is an original power. "It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted." I quote the words of the court in the case of Marbury *v.* Madison.

And so far is this clause from giving a power to revise and correct, that it actually vests in the district judge the same latitude of discretion by the same words that it communicates to this court. And without derogating from a respectability which I must feel as deep an interest in maintaining as any member of this court, I must believe that the district court, or any individual district judge, possesses the same power to revise our decision, that we do to revise theirs; nay, more, for the powers with which they may be vested are not so particularly limited and divided by the constitution as ours are. Should we perform an act which, according to our own principle, we cannot be vested with power to perform, what obligation would any other court or judge be under to respect that act? There is one mode of construing this clause, which appears to me to remove all ambiguity, and to render every part of it sensible and operative. By the consent of his sovereign, a foreign minister may be subjected to the laws of the State near which he resides. This court may then be

called upon to exercise an original criminal jurisdiction. If the power of this court to bail be confined to that one case, *reddendo singula singulis*, if the power of the several courts and individual judges be referred to their respective jurisdictions, all clashing and interference of power ceases, and sufficient means of redress are still held out to the citizen, if deprived of his liberty; and this surely must have been the intention of the legislature. It never could have been contemplated that the mandates of this court * should be [*107] borne to the extremities of the States, to convene before them every prisoner who may be committed under the authority of the general government. Let it be remembered that I am not disputing the power of the individual judges who compose this court to issue the writ of *habeas corpus*. This application is not made to us as at chambers, but to us as holding the supreme court of the United States, a creature of the constitution, and possessing no greater capacity to receive jurisdiction or power than the constitution gives it. We may in our individual capacities, or in our circuit courts, be susceptible of powers merely ministerial, and not inconsistent with our judicial characters, for on that point the constitution has left much to construction; and on such an application the only doubt that could be entertained would be, whether we can exercise any power beyond the limits of our respective circuits. On this question I will not now give an opinion. One more observation, and I dismiss the subject.

In the case of Burford, I was one of the members who constituted the court. I owe it to my own consistency to declare that the court were then apprized of my objections to the issuing of the writ of *habeas corpus*. I did not then comment at large on the reasons which influenced my opinion, and the cause was this: the gentleman who argued that cause confined himself strictly to those considerations which ought alone to influence the decisions of this court. No popular observations on the necessity of protecting the citizen from executive oppression, no animated address calculated to enlist the passions or prejudices of an audience in defence of his motion, imposed on me the necessity of vindicating my opinion. I submitted in silent deference to the decision of my brethren.

In this case I feel myself much relieved from the painful sensation resulting from the necessity of dissenting from the majority of the court, in being supported by the opinion of one of my brethren, who is prevented by indisposition from attending.

* The marshal of the District of Columbia having returned [*108] upon the *habeas corpus*, that he detained the prisoners by virtue of the before-recited order of the circuit court of that district

C. Lee now moved that they should be discharged; or at least admitted to bail.

[*114] *MARSHALL, C. J. I understand the clear opinion of the court to be, (if I mistake it my brethren will correct me,) that it is unimportant whether the commitment be regular in point of form, or not; for this court, having gone into an examination of the evidence upon which the commitment was grounded, will proceed to do that which the court below ought to have done.

[*125] *MARSHALL, C. J., delivered the opinion of the court.

The prisoners having been brought before this court on a writ of *habeas corpus*, and the testimony on which they were committed having been fully examined and attentively considered, the court is now to declare the law upon their case.

This being a mere inquiry, which, without deciding upon guilt, precedes the institution of a prosecution, the question to be determined is, whether the accused shall be discharged or held to trial; and if the latter, in what place they are to be tried, and whether they shall be confined or admitted to bail. "If," says a very learned and accurate commentator, "upon this inquiry, it manifestly appears that no such crime has been committed, or that the suspicion entertained of the prisoner was wholly groundless, in such cases only is it lawful totally to discharge him. Otherwise he must either be committed to prison or give bail."

The specific charge brought against the prisoners is treason in levying war against the United States.

As there is no crime which can more excite and agitate the passions of men than treason, no charge demands more from the tribunal before which it is made a deliberate and temperate inquiry. Whether this inquiry be directed to the fact or to the law, none can be more solemn, none more important to the citizen or to the government; none can more affect the safety of both.

To prevent the possibility of those calamities which result
[*126] from the extension of treason to offences of minor *importance, that great fundamental law which defines and limits the various departments of our government has given a rule on the subject both to the legislature and the courts of America, which neither can be permitted to transcend.

"Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

To constitute that specific crime for which the prisoners now be-

fore the court have been committed, war must be actually levied against the United States. However flagitious may be the crime of conspiring to subvert by force the government of our country, such conspiracy is not treason. To conspire to levy war, and actually to levy war, are distinct offences. The first must be brought into open action by the assemblage of men for a purpose treasonable in itself, or the fact of levying war cannot have been committed. So far has this principle been carried, that, in a case reported by Ventris, and mentioned in some modern treatises on criminal law, it has been determined that the actual enlistment of men to serve against the government does not amount to levying war. It is true that in that case the soldiers enlisted were to serve without the realm, but they were enlisted within it, and if the enlistment for a treasonable purpose could amount to levying war, then war had been actually levied.

It is not the intention of the court to say that no individual can be guilty of this crime who has not appeared in arms against his country. On the contrary, if war be actually levied, that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors. But there must be an actual assembling of men for the treasonable purpose, to constitute a levying of war.

Crimes so atrocious as those which have for their object the subversion by violence of those laws and those * institu- [*127] tions which have been ordained in order to secure the peace and happiness of society, are not to escape punishment because they have not ripened into treason. The wisdom of the legislature is competent to provide for the case; and the framers of our constitution, who not only defined and limited the crime, but with jealous circumspection attempted to protect their limitation by providing that no person should be convicted of it, unless on the testimony of two witnesses to the same overt act, or on confession in open court, must have conceived it more safe that punishment in such cases should be ordained by general laws, formed upon deliberation, under the influence of no resentments, and without knowing on whom they were to operate, than that it should be inflicted under the influence of those passions which the occasion seldom fails to excite, and which a flexible definition of the crime, or a construction which would render it flexible, might bring into operation. It is, therefore, more safe as well as more consonant to the principles of our constitution, that the crime of treason should not be extended by construction to doubtful cases; and that crimes not clearly within the

constitutional definition, should receive such punishment as the legislature in its wisdom may provide.

To complete the crime of levying war against the United States, there must be an actual assemblage of men for the purpose of executing a treasonable design. In the case now before the court, a design to overturn the government of the United States in New Orleans by force, would have been unquestionably a design which, if carried into execution, would have been treason, and the assemblage of a body of men for the purpose of carrying it into execution would amount to levying of war against the United States; but no conspiracy for this object, no enlisting of men to effect it, would be an actual levying of war.

In conformity with the principles now laid down, have been the decisions heretofore made by the judges of the United States.

[* 128] * The opinions given by Judge Paterson and Judge Iredell, in cases before them, imply an actual assembling of men, though they rather designed to remark on the purpose to which the force was to be applied than on the nature of the force itself. Their opinions, however, contemplate the actual employment of force.

Judge Chase, in the trial of Fries, was more explicit.

He stated the opinion of the court to be, "that if a body of people conspire and meditate an insurrection to resist or oppose the execution of any statute of the United States by force, they are only guilty of a high misdemeanor; but if they proceed to carry such intention into execution by force, that they are guilty of the treason of levying war; and the *quantum* of the force employed neither lessens nor increases the crime; whether by one hundred, or one thousand persons, is wholly immaterial." "The court are of opinion," continued Judge Chase, on that occasion, "that a combination or conspiracy to levy war against the United States is not treason, unless combined with an attempt to carry such combination or conspiracy into execution; some actual force or violence must be used in pursuance of such design to levy war; but it is altogether immaterial whether the force used is sufficient to effectuate the object; any force connected with the intention will constitute the crime of levying war."

The application of these general principles to the particular case before the court will depend on the testimony which has been exhibited against the accused.

The first deposition to be considered is that of General Eaton. This gentleman connects in one statement the purport of numerous conversations held with Colonel Burr throughout the last winter. In the course of these conversations were communicated various crimi-

nal projects which seem to have been revolving in the mind of the projector. An expedition against Mexico seems to have been the first and most matured part of his plan, if indeed it did not constitute a distinct and separate plan, * upon the success [* 129] of which, other schemes still more culpable, but not yet well digested, might depend. Maps and other information preparatory to its execution, and which would rather indicate that it was the immediate object, had been procured, and for a considerable time, in repeated conversations, the whole efforts of Colonel Burr were directed to prove to the witness, who was to have held a high command under him, the practicability of the enterprise, and in explaining to him the means by which it was to be effected.

This deposition exhibits the various schemes of Colonel Burr, and its materiality depends on connecting the prisoners at the bar in such of those schemes as were treasonable. For this purpose the affidavit of General Wilkinson, comprehending in its body the substance of a letter from Colonel Burr, has been offered, and was received by the circuit court. To the admission of this testimony great and serious objections have been made. It has been urged that it is a voluntary or rather an extrajudicial affidavit, made before a person not appearing to be a magistrate, and contains the substance only of a letter, of which the original is retained by the person who made the affidavit.

The objection that the affidavit is extrajudicial resolves itself into the question whether one magistrate may commit on an affidavit taken before another magistrate. For if he may, an affidavit made as the foundation of a commitment ceases to be extrajudicial, and the person who makes it would be as liable to a prosecution for perjury as if the warrant of commitment had been issued by the magistrate before whom the affidavit was made.

To decide that an affidavit made before one magistrate would not justify a commitment by another, might in many cases be productive of great inconvenience, and does not appear susceptible of abuse if the verity of the certificate be established. Such an affidavit seems admissible on the principle that before the accused is put upon his trial all the proceedings are *ex parte*. The court, therefore, overrule this objection.

* That which questions the character of the person who [* 130] has on this occasion administered the oath is next to be considered.

The certificate from the office of the department of State has been deemed insufficient by the counsel for the prisoners, because the law does not require the appointment of magistrates for the territory of

New Orleans to be certified to that office; because the certificate is in itself informal, and because it does not appear that the magistrates had taken the oath required by the act of congress.

The first of these objections is not supported by the law of the case, and the second may be so readily corrected, that the court has proceeded to consider the subject as if it were corrected, retaining, however, any final decision, if against the prisoners, until the correction shall be made. With regard to the third, the magistrate must be presumed to have taken the requisite oaths, since he is found acting as a magistrate.

On the admissibility of that part of the affidavit which purports to be as near the substance of the letter from Colonel Burr to General Wilkinson as the latter could interpret it, a division of opinion has taken place in the court. Two judges are of opinion that as such testimony delivered in the presence of the prisoner on his trial would be totally inadmissible, neither can it be considered as a foundation for a commitment. Although in making a commitment the magistrate does not decide on the guilt of the prisoner, yet he does decide on the probable cause, and a long and painful imprisonment may be the consequence of his decision. This probable cause, therefore, ought to be proved by testimony in itself legal, and which, though from the nature of the case it must be *ex parte*, ought in most other respects to be such as a court and jury might hear.

Two judges are of opinion that in this incipient stage of the prosecution, an affidavit stating the general purport of a letter may be read, particularly where the person in possession of it is [*131] at too great a distance to admit of its * being obtained, and that a commitment may be founded on it.

Under this embarrassment it was deemed necessary to look into the affidavit for the purpose of discovering whether, if admitted, it contains matter which would justify the commitment of the prisoners at the bar on the charge of treason.

That the letter from Col. Burr to General Wilkinson relates to a military enterprise meditated by the former, has not been questioned. If this enterprise was against Mexico, it would amount to a high misdemeanor; if against any of the territories of the United States, or if in its progress the subversion of the government of the United States in any of their territories was a mean clearly and necessarily to be employed, if such mean formed a substantive part of the plan, the assemblage of a body of men to effect it would be levying war against the United States.

The letter is in language which furnishes no distinct view of the design of the writer. The coöperation, however, which is stated to have

been secured, points strongly to some expedition against the territories of Spain. After making these general statements, the writer becomes rather more explicit, and says, "Burr's plan of operations is to move down rapidly from the falls on the 15th of November with the first 500 or 1,000 men in light boats now constructing for that purpose, to be at Natchez between the 5th and 15th of December, there to meet Wilkinson; then to determine whether it will be expedient in the first instance to seize on, or to pass by Baton Rouge. The people of the country to which we are going are prepared to receive us. Their agents now with Burr say that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled."

There is no expression in these sentences which would justify a suspicion that any territory of the United States was the object of the expedition.

*For what purpose seize on Baton Rouge; why engage [*132] Spain against this enterprise, if it was designed against the United States?

"The people of the country to which we are going are prepared to receive us." This language is peculiarly appropriate to a foreign country. It will not be contended that the terms would be inapplicable to a territory of the United States, but other terms would more aptly convey the idea, and Burr seems to consider himself as giving information of which Wilkinson was not possessed. When it is recollected that he was the governor of a territory adjoining that which must have been threatened, if a territory of the United States was threatened, and that he commanded the army, a part of which was stationed in that territory, the probability that the information communicated related to a foreign country, it must be admitted, gains strength.

"Their agents now with Burr say, that if we will protect their religion, and will not subject them to a foreign power, in three weeks all will be settled."

This is apparently the language of a people who, from the contemplated change in their political situation, feared for their religion, and feared that they would be made the subjects of a foreign power.

That the Mexicans should entertain these apprehensions was natural, and would readily be believed. They were, if the representation made of their dispositions be correct, about to place themselves much in the power of men who professed a different faith from theirs, and who, by making them dependent on England or the United States, would subject them to a foreign power.

That the people of New Orleans, as a people, if really engaged in

in the conspiracy, should feel the same apprehensions, and require assurances on the same points, is by no means so obvious.

There certainly is not in the letter delivered to General Wilkinson, so far as the letter is laid before the court, one syllable [*133] which has a necessary or a natural reference *to an enterprise against any territory of the United States.

That the bearer of this letter must be considered as acquainted with its contents, is not to be controverted. The letter and his own declarations evince the fact. After stating himself to have passed through New York, and the western States and territories, without insinuating that he had performed on his route any act whatever which was connected with the enterprise, he states their object to be, "to carry an expedition to the Mexican provinces."

This statement may be considered as explanatory of the letter of Col. Burr, if the expressions of that letter could be thought ambiguous.

But there are other declarations made by Mr. Swartwout, which constitute the difficulty of this case. On an inquiry from General Wilkinson, he said, "this territory would be revolutionized where the people were ready to join them, and that there would be some seizing he supposed, at New Orleans."

If these words import that the government established by the United States in any of its territories, was to be revolutionized by force, although merely as a step to, or a mean of executing some greater projects, the design was unquestionably treasonable, and any assemblage of men for that purpose would amount to a levying of war. But on the import of the words a difference of opinion exists. Some of the judges suppose they refer to the territory against which the expedition was intended; others to that in which the conversation was held. Some consider the words, if even applicable to a territory of the United States, as alluding to a revolution to be effected by the people, rather than by the party conducted by Col. Burr.

But whether this treasonable intention be really imputable to the plan or not, it is admitted that it must have been carried [*134] into execution by an open assemblage of *men for that purpose, previous to the arrest of the prisoner, in order to consummate the crime as to him; and a majority of the court is of opinion that the conversation of Mr. Swartwout affords no sufficient proof of such assembling.

The prisoner stated that "Col Burr, with the support of a powerful association extending from New York to New Orleans, was levying an armed body of 7,000 men from the State of New York and the western States and territories, with a view to carry an expedition to the Mexican territories."

That the association, whatever may be its purpose, is not treason, has been already stated. That levying an army may or may not be treason, and that this depends on the intention with which it is levied, and on the point to which the parties have advanced, has been also stated. The mere enlisting of men, without assembling them, is not levying war. The question, then, is whether this evidence proves Col. Burr to have advanced so far in levying an army as actually to have assembled them.

It is argued that since it cannot be necessary that the whole 7,000 men should have assembled, their commencing their march by detachments to the place of rendezvous must be sufficient to constitute the crime.

This position is correct, with some qualification. It cannot be necessary that the whole army should assemble, and that the various parts which are to compose it should have combined. But it is necessary that there should be an actual assemblage, and, therefore, the evidence should make the fact unequivocal.

The travelling of individuals to the place of rendezvous would perhaps not be sufficient. This would be an equivocal act, and has no warlike appearance. The meeting of particular bodies of men, and their marching from places of partial to a place of general rendezvous, would be such an assemblage.

The particular words used by Mr. Swartwout are, that Col. Burr "was levying an armed body of 7,000 men." * If [*135] the term levying, in this place, imports that they were assembled, then such fact would amount, if the intention be against the United States, to levying war. If it barely imports that he was enlisting or engaging them in his service, the fact would not amount to levying war.

It is thought sufficiently apparent that the latter is the sense in which the term was used. The fact alluded to, if taken in the former sense, is of a nature so to force itself upon the public view, that if the army had then actually assembled, either together or in detachments, some evidence of such assembling would have been laid before the court.

The words used by the prisoner in reference to seizing at New Orleans, and borrowing perhaps by force from the bank, though indicating a design to rob, and consequently importing a high offence, do not designate the specific crime of levying war against the United States.

It is, therefore, the opinion of a majority of the court, that in the case of Samuel Swartwout there is not sufficient evidence of his levying war against the United States to justify his commitment on the charge of treason.

Against Erick Bollman there is still less testimony. Nothing has been said by him to support the charge that the enterprise in which he was engaged had any other object than was stated in the letter of Col. Burr. Against him, therefore, there is no evidence to support a charge of treason.

That both of the prisoners were engaged in a most culpable enterprise against the dominions of a power at peace with the United States, those who admit the affidavit of General Wilkinson cannot doubt. But that no part of this crime was committed in the District of Columbia is apparent. It is, therefore, the unanimous opinion of the court that they cannot be tried in this district.

[* 136] * The law read on the part of the prosecution is understood to apply only to offences committed on the high seas, or in any river, haven, basin, or bay, not within the jurisdiction of any particular state. In those cases there is no court which has particular cognizance of the crime, and, therefore, the place in which the criminal shall be apprehended, or, if he be apprehended where no court has exclusive jurisdiction, that to which he shall be first brought, is substituted for the place in which the offence was committed.

But in this case, a tribunal for the trial of the offence, wherever it may have been committed, had been provided by congress; and at the place where the prisoners were seized by the authority of the commander in chief, there existed such a tribunal. It would, too, be extremely dangerous to say, that because the prisoners were apprehended, not by a civil magistrate, but by the military power, there could be given by law a right to try the persons so seized in any place which the general might select, and to which he might direct them to be carried.

The act of congress which the prisoners are supposed to have violated, describes as offenders those who begin or set on foot, or provide, or prepare, the means for any military expedition or enterprise to be carried on from thence against the dominions of a foreign prince or state, with whom the United States are at peace.

There is a want of precision in the description of the offence which might produce some difficulty in deciding what cases would come within it. But several other questions arise which a court consisting of four judges finds itself unable to decide, and, therefore, as the crime with which the prisoners stand charged has not been committed, the court can only direct them to be discharged. This is done with the less reluctance because the discharge does not acquit them from the offence which there is probable cause for supposing they have committed, and if those whose duty it is to protect the nation, by prosecuting offenders against the laws, shall suppose

those who have been charged with treason to be proper [*137] objects for punishment, they will, when possessed of less exceptionable testimony, and when able to say at what place the offence has been committed, institute fresh proceedings against them.

7 W. 38; 3 P. 193; 7 P. 568; 14 P. 614; 5 H. 176; 7 H. 1; 14 H. 103; 18 H. 307.

SKILLERN'S EXECUTORS v. MAY'S EXECUTORS.

4 C. 137.

If the obligee of a bond obtain titles in his own name for part of the lands, the assignment of which to the obligor was the consideration of the bond, and suffer the titles to the residue of the lands to be lost by the non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law upon the bond.

ERROR to the district court of the United States for the district of Kentucky, in chancery.

The facts of the case, as they appear upon the record, are as follows:

Skillern put into the hands of Richard May several land-warrants to locate in Kentucky, under an agreement that May should have half the land for locating the whole, who accordingly located the quantity of 2,500 acres in the name of Skillern, but not to his satisfaction, and the matter was not settled between them at the time of Robert May's death, when his interest in the lands so located descended to his son, John May, the defendants' testator. Skillern afterwards came to an agreement with John May, on the 6th of March, 1785, by which Skillern was to assign to John May, one military warrant for 200 acres of land, and all the treasury warrants located in the name of Skillern with the entries and locations made thereon, which assignment was on the same day executed, but never lodged in the land-office, or the office of the surveyor of the county where the lands were situated. In consideration of this assignment, and in full of all demands by Skillern against the representatives of Robert May's estate, John May gave to Skillern a bond, dated March 6th, 1785, to convey to Skillern 1,000 acres of the land to which Robert May was entitled at his death, and which remained unsurveyed, to be chosen by Skillern before the 15th of June, 1786. *It was [*138] also agreed by another writing of the same date, that if

Skillern would give up the bond for 1,000 acres, John May should convey to him 1,100 acres of other land described in the writing, and Skillern was to make his election of the one or the other before the 1st of October, 1786. This last agreement was afterwards cancelled, and a bond in lieu thereof given by John May to Skillern, dated October the 9th, 1787, to convey to the latter on or before the 1st of December, 1788, "eleven hundred acres of first rate elk-horn land, well watered, and lying within ten miles of Lexington."

Skillern, notwithstanding the assignment of his military and treasury warrants to John May, afterwards obtained patents thereon for 1,050 acres, of the value of $4,416.66.

There was no evidence that Skillern ever offered to convey those lands to May, or his representatives.

The bond of 6th of March, 1785, and that of the 9th of October, 1787, were both fraudulently placed by Skillern in the hands of his agent, for the purpose of enforcing payment of both. The agent, supposing both bonds to be due, entered into an agreement with John May's executors, the present defendants, for the discharge of the bond of 6th of March, 1785, and the same was given up by Skillern's agent to the defendants, with a receipt thereon. But the agent finding afterwards that the bond of 6th of March, 1785, was vacated by that of the 9th of October, 1787, refused to carry that agreement into effect, but brought an action of covenant upon the condition of the last-mentioned bond, and recovered damages to the amount of $8,433.33.

John May devised his lands to his executors for the payment of his debts, and this bill was brought by Skillern in his lifetime, to subject the same to the payment of the judgment recovered at law. Pending this suit in chancery, Skillern died, leaving infant heirs, and the suit was revived in the name of his executors. Sixty acres, part of the 1,050 acres, had been sold for the payment of the State tax [*139] due from Skillern, *and the two tracts of 300 and 250 acres had been sold for the direct tax due to the United States, but were redeemed by the purchaser of the 60 acres.

After the filing of this bill, and after the death of Skillern, John May's executors filed a cross bill against Skillern's executors, and it was agreed that both suits should be tried at the same time.

The court below decreed a perpetual injunction as to $4,416.66, part of the judgment at law, the same being the value of the 1,050 acres patented in the name of Skillern, and decreed payment of the residue out of the real estate of John May, unless it should be otherwise paid, by a day named in the decree.

Both parties sued out their writ of error.

H. Clay, for Skillern's executors.

C. Lee, for May's executors.

*This COURT gave no other opinion in this case than is [*140] expressed in the following decree:

"It is the opinion of the court that G. Skillern, by acquiring to himself the legal estate to 1,050 acres of land, the equitable right to which he had transferred to John May, on the 6th of March, 1785, (and having never conveyed or offered to convey the said lands to May, or to his legal representatives,) and it appearing that at the time of the decrees rendered in these causes, certain parts of the said entries to which Skillern had thus acquired the legal title, and which constituted a part of the consideration of the bond on which the judgment at law was entered, had been lost in consequence of the neglect of Skillern to pay the taxes due thereon, the complainants below in the original suit were not entitled to the aid of a court of equity to enforce *the execution of the obligation of the 9th of [*141] October, 1787, or to obtain satisfaction of the judgment at law founded thereon.

"It is therefore decreed and ordered, that the decree of the district court rendered in the original cause be reversed and annulled with costs; and this court doth remand the same to the said district court for further proceedings to be had therein, in order that an equal and just partition of the 2,500 acres of land mentioned in the said assignment of the 6th of March, 1785, be made between the legal representatives of the said George Skillern and the said John May.

"And as to so much of the decree in the cross suit as enjoins $4,416.66, part of the judgment at law, this court doth affirm the same; and as to the residue of the said decree, it is decreed and ordered, that the same be reversed and annulled, with costs; and this court, proceeding to give such decree in the said cross suit as the said district court ought to have given, it is further decreed and ordered, that the judgment at common law mentioned in the said bill be perpetually enjoined."

French's Executrix v. The Bank of Columbia.

4 C. 141.

To charge one who indorses a promissory note for the accommodation of the maker, a demand on the maker and notice to the indorser are necessary.

Error to the circuit court for the District of Columbia. The question, raised and decided, appears in the opinion of the court.

The case is sufficiently stated in the opinion.

Harper, for the plaintiff.

Mason, for the defendant.

[*153] *Marshall, C. J., delivered the opinion of the court.

The material question in this case is, whether a person who indorses a promissory note for the accommodation of the drawer, be discharged from the responsibility which the indorsement creates, by the failure of the holder to demand payment of the maker in the usual time, and to give notice to the indorsor that the note is not paid.

That by the general rule of law, the omission to demand payment from the maker when the note becomes payable, and to give notice to the indorsor that payment has been refused, discharges [*154] the indorsor, is admitted; *but from this general rule of law exceptions exist, and the counsel for the defendants in error contend, that the case stated is comprehended in one of these exceptions.

It is laid down as an exception to the general rule, in its application to bills of exchange, that if the drawer has no effects in the hands of the drawee, notice of the dishonor of the bill may be dispensed with, and the case of an indorsor of a promissory note for the accommodation of the maker, is said to come within the same reason and the same law.

The correctness of this position will be best tested by considering the reason of the rule, and the reason for the exception.

Why is it that notice must immediately be given to the drawer that his bill is dishonored by the drawee? It is because he is presumed to have effects in the hands of the drawee, in consequence of which the drawee ought to pay the bill, and that he may sustain an injury, by acting on the presumption that the bill is actually paid.

The law requires this notice, not merely as an indemnity against actual injury, but as a security against a possible injury, which may result from the laches of the holder of the bill. To this security, then it would seem, the drawer ought to remain entitled, unless his case be such as to take him out of the reason of the rule.

A drawer who has no effects in the hands of the drawee, is said to be without the reason of the rule, and, therefore, to form an exception to it.

This has been laid down in the books as a positive qualification of the rule, but has seldom been so laid down, except in cases where, in point of fact, the drawer had no right to expect that his bill would be honored, and could sustain no injury by the neglect of the holder, to give notice of its being dishonored. In reason it would seem, that in such cases only, can the exception be admitted, and that the necessity of notice ought to be dispensed with, only in those cases where * notice must be unnecessary, or immaterial to [*155] the drawer.

The reasoning of the judges, in most of the cases which have been cited, would seem to warrant this restriction of the exception.

The case of Bickerdike v. Bollman, 1 T. R. 405, was a bill drawn by a debtor on his creditor, without a single accompanying circumstance, which could raise an expectation that the bill would be accepted or paid. Notice in this case was declared to be unnecessary. Justice Ashhurst gives as a reason for this opinion, that the drawing was in itself a fraud. This reason must be considered as additional to the general ground, on which the case was placed in the argument, which was, that the want of notice could not possibly affect the drawer. The particular reason given by Justice Ashhurst for his opinion, is clearly inapplicable to any case in which the drawer was justified in drawing.

Into the opinion of Justice Buller, some general reasoning is introduced, from which it is fairly deducible that he considered the drawer as having no right to expect that the bill would be paid, and as being liable to no injury from the want of notice, and that these were the true grounds of the exception.

He says, "If it be proved on the part of the plaintiff, that from the time the bill was drawn till the time it became due, the drawee never had any effects of the drawer in his hands, I think notice to the drawer is not necessary; for he must know whether he had effects in the hands of the drawee or not; and if he had none, he had no right to draw upon him and to expect payment from him; nor can he be injured by the non-payment of the bill, or the want of notice that it has been dishonored."

These observations were, in fact, applicable to the case, for the draw-

er was the debtor of the drawee, and had no right to draw the bill, nor reason to expect that it would be accepted.

[*156] *This principle was recognized in Goodall et al. v. Dolly, 1 T. R. 712, in which the same idea, so far as respects the impossibility of injury to the drawer, was repeated.

This point came on again to be considered in the case of Rogers v. Stephens, 2 T. R. 713, in which, as between the drawer and drawee there was no pretext of a right to draw. It was said that a third person had stated himself to have funds in the hands of the drawee; that the bill was really drawn on the credit of those funds, and that loss had been actually sustained from the want of notice. But these facts formed no part of the case. If they had, it is apparent that, in the opinions of Lord Kenyon and Justice Grose, they would have been decisive in favor of the necessity of notice, unless that necessity had been dispensed with by the subsequent conduct of the drawer. Lord Kenyon states the reason why notice need not be given to the person who draws without funds in the hands of the drawee to be, "because the drawer must know that he had no right to draw on the drawee." The opinions of Lord Kenyon and Justice Grose in this respect, though not assented to, were not controverted by Justice Ashhurst.

The decision in Rogers v. Stephens, 2 T. R. 713, was made on the authority of Bickerdike v. Bollman.

It would seem to be the fair construction of these cases, that a person having a right to draw in consequence of engagements between himself and the drawee, or in consequence of consignments made to the drawee, or from any other cause, ought to be considered as drawing upon funds in the hands of the drawee, and, therefore, as not coming within the exception to the general rule.

The transaction cannot be denominated a fraud, for in such case it is a fair commercial transaction.

Neither can it be truly said that he had no right to expect his bill would be paid, for a person authorized to draw must expect his draft will be honored.

[*157 *Neither can it be said that he has virtual notice of the protest, and that actual notice is useless, and the want of it can do him no injury; for this is only true when at the time of drawing the drawer has no reason to expect that his bill will be paid.

A person having a right to draw, and a fair right to expect that his bill will be honored, would not come within the reason of the exception, and, therefore, it may well be contended, ought not to be brought within the exception itself.

This doctrine appears to be contradicted in the case of Walwyn v. St. Quintin, 1 Bos. & Pul. 652.

In that case the bill was drawn to accommodate the indorsor, who had previously placed securities, on which he wished to raise money, in the hands of the acceptor; but the drawer had no effects in his hands. It was determined that, in this case, notice to the drawer was unnecessary.

If this determination should be considered without examining the reasoning on which it was founded, the reader would conclude that the single circumstance of drawing without funds in the hands of the drawee belonging to the drawer, subjected him, without notice, to the payment of his bill, if dishonored, at any period of time when not barred by the act of limitations; and that no demonstration of his perfect right to draw, or of the loss to which the want of notice had exposed him, could relieve him from the claim of the holder of the bill. For in this case, the drawee having accepted on funds, the drawer had a right to expect that the bill would be paid, could not be chargeable with fraud in drawing, nor required to prepare other funds to prevent the disgrace and injury of his bill's being dishonored, or to take measures to secure himself against the acceptor or indorsor. He does not appear to have come within any one reason assigned in the cases of Bickerdike *v.* Bollman, or of Rogers *v.* Stephens, for the exception stated in those cases to the general rule.

* This induces the necessity of examining with particular [*158] attention the reasons given by the judge, which must be considered as explanatory of the decision.

In delivering the opinion of the court, Lord Chief Justice Eyre said, "The true fact is, that this was the acceptor's bill, and not the drawer's." "The transaction in this case was a mode by which the acceptor advanced a sum of money to the payee, and the drawer was a mere instrument of the acceptor." "It seems clear, that notice can be of no use to him, his situation being this, that if the acceptor do not pay, he must, and may then, and not till then, resort to the acceptor to be reimbursed. Notice, therefore, can amount to nothing, for his situation cannot be changed."

It is observable that the principle supposed to be laid down in the cases previously adjudged as constituting the reason for the exception is here expressly recognized, and forms the great and operative motive for the judgment of the court. It is, that notice could be of no use, that the drawer could not avail himself of it, that he could take no step which would in any manner change his situation, that he could have no recourse against the acceptor until he paid the bill.

In no case is the reason of the exception more explicitly given, and the only difficulty is to apply the reasoning to the facts as reported.

The court seems to have supposed, that since the drawer could not maintain an action against the acceptor until he had taken up the bill, that it was perfectly useless to enable him, by proper notice, to employ those other various means which he might have taken to secure himself. Such is not the reasoning of the judges in the cases previously decided; and this reasoning certainly would not be permitted to apply to an indorsor who had given value for the bill, not knowing that it was drawn, without funds in the hands of the drawee. Yet he would be unable to recover from the drawer, until he had taken up the bill.

[*159] *If an action could not have been maintained, might not the drawer have effects of the drawee in his hands which he might retain; or might not various other means of saving himself be neglected, in consequence of the opinion that the bill would be paid? If this might be, how can it be true that notice can be of no use to him?

If the fact even be that the drawer could only sue the acceptor in such a case as this, after having himself discharged the bill, still he ought to have notice, that he might immediately take it up for the purpose of proceeding against the acceptor.

The reasoning of Lord Chief Justice Eyre, to be perfectly consistent with itself and with the principles laid down in previous decisions, would seem to be predicated on an understanding on the part of the drawer when the bill was drawn, that it was not to be paid by the acceptor; or on the idea that a bill drawn without funds is not a commercial transaction, and not subject to commercial rules.

The presumptions are rendered the stronger from the cases afterwards stated, in which a drawer without funds in the hands of his drawee would still be entitled to notice. These are "acceptances on the faith of consignments from the drawer not come to hand," and "acceptances on the ground of fair mercantile agreement;" to which, he says, may possibly be added many others.

If the exception admits of these exceptions and of many others, it would be difficult to apply it to any case of a fair transaction, where the drawer had really a right to draw, unless it be supposed not to be governed by the law merchant.

The judge next proceeds to describe the case in which notice is not requisite.

He says, "Where the drawer has no effects, and has no fair pretence for drawing, or where he draws without effects in-

[*160] tended to be applied in payment, and only *for the purpose of raising money by discount for himself, and *à fortiori* for

the acceptor, it is fairly deducible from the cases that notice need not be given."

It is not only necessary that the drawer should have no effects, but also that he should have no fair pretence for drawing. Now he may have a fair pretence, as in the case of a "fair mercantile agreement," without having any funds in the hands of the drawee, which notice of non-acceptance of the bill might enable him to withdraw; and yet in such case it would appear, from the language of the court, that notice could not be dispensed with.

"Where he draws only for the purpose of raising money by discount for himself, and *à fortiori* for the acceptor," notice need not be given.

Where he draws solely for the purpose of raising money by discount for himself, he expects to pay the bill, and there is no person to whom he can resort for repayment. There is no person on whom he can have a legal or an equitable demand, in consequence of the non-payment of the bill. But how can the same reasoning be said to apply *à fortiori* to the case of the bill being drawn for the use of the acceptor? In such case the relative situation of the parties must be substantially the same as if the money raised on the bill for the acceptor, were funds of the drawer in his hands, on which the bill was drawn. Every motive for requiring notice of non-payment, in the case of a bill drawn upon funds, except that which results from a right to claim those funds by a suit, would apply to a bill drawn to raise money for the acceptor, unless it was understood at the time that the acceptor was not to pay the bill.

The case of Walwyn *v.* St. Quintin, then, can only be supported on the idea of an understanding that the drawee was not to pay the bill, or that a bill, drawn, not in the usual course of business, is a transaction to which commercial rules do not apply.

In the case of Whitfield *v.* Savage, (2 Bos. & Pull. [*161] 277,) the drawer had funds in the hands of the acceptor, and the decision turned upon that point.

The reasoning on the cases of protested bills has been gone into the more at large, because it has been considered as applicable to promissory notes indorsed under the statute of Anne, which is admitted to be in force in Maryland.

The indorser has been considered as the drawer, and the maker of the note as the acceptor; and in all cases of an indorsement for accommodation, the indorser is likened to a drawer without funds in the hands of the acceptor.

Where the money raised upon the note is received by the indorser,

so that the note is discounted, in truth, for his accommodation, not for that of the maker, he is unquestionably without funds in the hands of the acceptor, must expect to pay the note himself, and cannot require notice of its non-payment by the maker. But the same reasons do not appear to exist where the note has been discounted for the maker. In that case the funds which represent the note are in the hands of the maker, or, to use the language applicable to bills, in the hands of the acceptor, before the draft becomes payable; the drawer had a right to draw, and had a right to expect that his bill would be paid. Upon principles of reason and of justice, then, it would seem that notice of non-payment could be as little dispensed with in this case, as if he had himself paid the money to the maker of the note, and then received it from the bank, or as if the note had been given him for a previous debt, and had been discounted for his own use.

Notice of non-payment by the maker is necessary, because the undertaking of the indorser is conditional; and wherever, in fact, the transaction is such that the maker of the note ought in justice to pay it, and is bound ultimately to make it good, it would seem reasonable that payment should be demanded from him, and that reasonable notice of non-payment should be given to the indorser.

[*162] *If, however, the course of decisions be otherwise, the indorser of a note for the accommodation of the maker must come within the exception which dispenses with notice in his case.

The cases which have been adjudged in England on promissory notes, are anterior, in point of time, to the cases of Walwyn *v.* St. Quintin, and of Whitfield *v.* Savage.

The first which has been cited is De Berdt *v.* Atkinson, (2 H. B. 336.) This note was indorsed for the accommodation of the maker, the indorser well knowing at the time that the maker was insolvent. Four judges who tried the cause were unanimously of opinion, that want of notice did not discharge the indorser. The opinion of the chief justice was founded on the known insolvency of the maker, and the consequent impossibility that loss could be sustained by the indorser from want of notice. The opinion of Justice Buller was founded on the circumstance that the note was indorsed for the accommodation of the drawer. He states explicitly, that the general rule is only applicable to fair transactions, and by fair transactions he means "bills or notes given for value in the ordinary course of trade."

Justices Heath and Rooke, accorded in the decision, but whether

for the reasons assigned by the chief justice, or for those assigned by Justice Buller, or for both, does not appear.

The same point came on to be considered in the case of Nicholson v. Gouthit, (2 H. B., 609.)

This was a strong case, because the indorsement was made in consequence of a previous engagement on the part of the indorser to guarantee the payment of a debt due from the maker of the note, who appears, from the transaction, to have been in bad circumstances at the time, and who became insolvent before the note was payable. From his connection with the maker, and from other circumstances, the indorser must have known that the maker would not pay the note, and it was the *understanding of all parties [*163] that it should be paid by the indorser.

The justice of the case was said to be clearly in favor of the plaintiff, and under an impression that the want of notice in this case could not injure the plaintiff, the lord chief justice had at the trial, instructed the jury that it was unnecessary, and indeed that it might be considered as received by anticipation.

In this case the note was not made merely to raise money, but was made to pay a debt. The indorser, however, gave no value for it, and, if likened to the drawer of a bill of exchange, he had drawn without funds in the hands of the acceptor, and with a knowledge that the acceptor would not pay the bill.

But in the argument in favor of a new trial, the counsel contended that the law upon a promissory note was different, in this respect, from the law on a bill of exchange, and though notice of the dishonor of a bill drawn without funds in the hands of the drawee need not be given, yet the rule in the case of promissory notes is totally different, and notice must in all cases be given to the indorser.

In delivering the opinion of the court, Lord Chief Justice Eyre assented to this distinction, and admitted the rule with respect to notice to the indorser to be as stated. He, therefore, reversed his own decision at *nisi prius*, and granted a new trial upon the strict law, contrary to his ideas of the justice of the case.

Heath and Rooke, concurred in this opinion. Buller was not present, and, reasoning from his opinion in the case of De Berdt *v.* Atkinson, it is probable he would not have concurred in the decision of this case.

However, then, the law may be with regard to the drawer of a bill of exchange who from other circumstances may fairly draw, but who has no effects in the hands of the drawer, it seems settled in England, by the case of Nicholson *v.* Gouthit, that the law with regard to a promissory note is different, and that, if in *any [*164]

case where the note is made for the benefit of the maker, notice to the indorser can be dispensed with, it is only in the case of an insolvency known at the time of indorsement.

In point of reason, justice, and the nature of the undertaking, there is no case in which the indorser is better entitled to demand strict notice than in the case of an indorsement for accommodation, the maker having received the value.

This court is of opinion that the circuit court erred in directing the jury that the *laches* of the plaintiffs, in failing to demand payment of the maker of the note, and to give notice of non-payment to the indorser, did not deprive the plaintiffs of their remedy against the indorser, and therefore, the judgment rendered in this case is reversed, and the cause remanded for further trial. A new trial, with instructions, &c.

Judgment reversed.

5 C. 49; 10 P. 572.

Hopkirk *v.* Bell.

4 C. 164.

This case was again certified from the circuit court for the district of Virginia.

It appeared upon the trial, in addition to the facts stated in the former report of the case,[1] that Andrew Johnston, one of the partners of the house, trading under the firm of Alexander Spiers, John Bowman, & Co., of whom the plaintiff is the surviving partner, came to this country after the treaty of peace, in 1783, namely, in the spring of 1784, and died here in 1785, but that no other partner of the firm has been in this country at any time since the treaty of peace.

[* 165] * The Court ordered it to be certified as their opinion that, under all the circumstances stated, the act of limitations of Virginia was not a bar to the plaintiff's demand on the note of 21st August, 1772.

[1] 3 C. 454.

Hicks et al. v. Rogers.

4 C. 165.

In Vermont, tenants in common may join in an action of ejectment.

Certificate of a division of opinion of the judges of the circuit court of the United States for the district of Vermont, upon the question whether the plaintiffs, as devisees of a tract of land, "to be equally divided between them," could maintain ejectment jointly.

Bradley, for the plaintiffs.

*The Court decided that the action was well brought, [*166] and that the will ought to be received in evidence to support the declaration.

The United States v. Zebulon Cantril. [*167]

4 C. 167.

In this case it was decided that the act of June 27, 1798, (1 Stats. at Large, 573,) was so repugnant as to be insufficient to support an indictment.[1]

*Sthreshley & Obannon v. The United States. [*169]

4 C. 169.

A collector of the revenue of the United States has no authority to receive duties after his removal from office, though they became payable while he was in office.

Error to the district court of the United States for the district of Kentucky, in an action of debt on the official bond of a collector of

[1] The Act of February 24, 1807, (2 Stats. at Large, 423,) was passed to remedy the defect.

the revenue arising from stills, &c. The question raised by the bill of exceptions was whether the collector was bound to account for duties which were outstanding and unpaid, when he was removed from office.

H. Marshall, for the plaintiff.

Rodney, attorney-general, for the United States.

[* 171] * MARSHALL, C. J., delivered the unanimous opinion of the court, that the power of the officer to collect the outstanding duties ceased upon his removal from office, and devolved upon his successor. A contrary construction would be extremely injurious to the revenues of the United States, and could not have been intended by the legislature.

The officer can only be liable to pay over the money he has collected, unless he is charged with a neglect of duty in not collecting.

In the present case the breach assigned is for not paying, and no breach is assigned in not collecting, the duties. The bill of exceptions shows that the defendant Sthreshley had paid over and accounted for all the duties he had collected.

Judgment reversed.

[* 172] * HUMPHREY MARSHALL AND WIFE *v.* JAMES CURRIE.

4 C. 172.

If the monuments called for in a deed are uncertain, the courses and distances may identify them, or may dispense with the necessity of identifying some of them, by rendering the whole description, taken together, sufficiently certain.

THE complainants filed their bill in the district court of the United States for the district of Kentucky, complaining that the defendant had obtained an elder patent for land covered by the complainants' elder entry, and praying for a conveyance of the legal title.

The only question was, whether the entry, under which the complainants claim, described the land with sufficient certainty. It was in these words: " Number two hundred and forty-one, Thomas Marshall enters two thousand acres of land on part of a military warrant,

number one thousand three hundred and forty-nine, beginning on the bank of Green river two hundred poles above a beech tree marked D. L., standing on the bank of the river, a few poles below the mouth of a branch, and a small distance above the place called Glover's, upon the opposite side of the river, thence running south seventy-five degrees east, one thousand poles, thence north, twenty-five degrees west, and from the beginning up the meanders of the river, and binding thereon so far that a line parallel to the first shall include the quantity. Entered August the sixth, one thousand seven hundred and eighty-four."

The material facts found by the jury, according to the practice of Kentucky, were, that the complainants' entry was made on the 6th of August, 1784, and the defendant's on the day following. That the defendant's patent bears date on the 14th of June, 1787, and the complainants' patent on the 3d of June, 1796, and that both patents include part of the same land. That the Green river, and the place called Glover's, were notorious by those names before, and at the time of the complainants' entry. That the watercourse delineated on the plat, by the name of Big Branch, is a branch running into Green river, 596 poles above the place called Glover's, [* 173] and on the opposite side of the river, and existed at the time of the entry. That the beech tree represented in the plat, stands on the bank of Green river, 18 poles below the mouth of the Big Branch, "and is a very conspicuous tree; and that the letters D. L., were marked at or near said tree, upon a beech, about November or December, one thousand seven hundred and eighty-three;" that the beginning corner of the complainants' survey is on the bank of Green river 200 poles next above the said beech tree, marked on the plat. That two other watercourses empty into the Green river; one called Clover-lick creek, below the Big Branch, and nearer to Glover's; the other called Embro's Spring Branch, above the Big Branch; both of which are laid down on the connected plat. The jury also found there is a small branch or drain about 250 yards long, running all the year, between Clover-lick creek and the lower line of the plaintiffs' survey, besides those represented on the plat. That beech abounds all along the bank of Green river, opposite to Glover's Station, and for a considerable distance below and above, except immediately above and below the mouth of the small branch or drain, and that there was no proof that there was any beech tree marked D. L. standing on the 6th of August, 1784, (the date of the complainants' entry,) upon the bank of Green river a few poles below the mouth of a branch, as described in the complainants' entry.

[*175] * *H. Marshall* for complainant.

H. Clay, for defendant.

JOHNSON, J., delivered the opinion of the court.

In the argument of counsel in this case, the only point which has been thought necessary to dwell upon, is the legal certainty of the complainants' entry. Pursuing the principle that a plaintiff must recover upon the strength of his own title, and not on the weakness of his adversary's, the defendant has not entered into any discussion relative to the sufficiency of his claim to the land in question. The circumstances constituting what in the courts of Kentucky are denominated the calls of the complainants' entry, are Glover's station, Green river, a marked tree on the bank of the river, and a branch emptying itself into the river. The two former are notorious, and the inquiry is, can the others be sufficiently ascertained with relation to them. We are of opinion that they can. The only
[*176] objection that can be made to the * identity of the tree and branch with relation to which the complainants have made their survey, and the actual distance of those objects above Glover's station, the uncertainty attendant upon calling for a tree of which a large number grow along the banks of the river, and the existence of another stream emptying itself into the same river near to Glover's station, and which it is contended will answer the call.

These difficulties, we are of opinion, are all removed by considering the courses called for by the complainants with relation to the courses of the river.

Above Glover's station, and until you reach the bend of the river above which the complainants' entry is surveyed, the course of the river is east and west. It there assumes a different direction, and its course is north and south. By surveying the entry at the point where the complainants have located their land, it assumes a shape adapted to the course of the river. At any point below where it is situated, and until you reach the place called Glover's station, it is impossible that it can be located. This circumstance is sufficient, in our opinion, to establish the branch which was called for, as it is the first you meet with above the bend; and when that is ascertained, there is no longer any difficulty in locating the complainants' land.

The jury find that the tree called for is very conspicuous, and that previous to the date of the complainants' entry a tree very near the spot where that is situated was marked D. L. Although a tree of a particular species, at a distance not precisely limited, may be uncertain where that tree abounds, the impression of a certain mark upon

such a tree is a sufficient identification, when accompanied with the other circumstances of this case, which might have been resorted to by a subsequent locator to prove the identity of this tree.

In giving this opinion the court is not uninfluenced by an anxiety to save the early estates acquired in that country. Such was the laxity of the rules upon which the rights of individuals depended under the land laws of Virginia, that this court feels a strong sense * of the necessity of liberality in deciding upon the va- [* 177] lidity of entries.

The court, therefore, reverses the decree of the district court, and decrees a conveyance, to be executed by the defendant to the complainants, of that part of the land contained in his patent which is included in the complainants' survey, and that each party pay their own costs.

Decree reversed.

VIERS and WIFE v. MONTGOMERY.

4 C. 177.

A court of equity will not interfere between a donee of land by deed, and a devisee under a will of the donor, in a case where there is no fraud.

ERROR to the district court of Kentucky, in a suit in chancery brought originally by Montgomery against W. M. Viers and Patsy his wife, late Patsy Henly, to compel the latter to convey to the former the legal estate in certain lands in Kentucky, which one Ebenezer Brooks, since deceased, conveyed, by deeds dated the 10th of November, 1791, to the defendant's wife, while a widow, and which Brooks, by his last will, devised to the complainant Montgomery. The bill charged that the only consideration of the deeds from Brooks to Patsy Henly was, that she should "take him as her husband," which she refused to do, but intermarried with the defendant, W. M. Viers. It did not aver that the complainant was of kin to the deceased, or that he had any equitable claim other than as a devisee. Nor did it charge the defendant Patsy with any promise of marriage, or any breach of such a promise, nor with fraud in obtaining the deeds. The will of Brooks, referred to in the bill, calls the complainant his friend and cousin. The deeds were of bargain and sale in fee, and purported to be in consideration of 1,100*l.* Virginia currency, and contained a warranty against Brooks, and all claiming under him.

[*178] *The answer of the defendants denied that the consideration of the deeds was as stated in the bill, and avers that the defendant Patsy, although solicited, always refused to make any promise of marriage to the deceased; that he often pressed her to accept his land, which she for some time declined; that he declared he did not expect any consideration, but wished her to receive it as a gift, and that he did not expect she would marry him.

It alleged that Brooks had boarded in her house some months, where he had been kindly and hospitably treated, without any charge being made against him, and suggested that this, together with the affection which he entertained for her, but which she always discountenanced, were his motives for giving her the land. That she at last, by the advice of her friends, accepted it, and that when he had executed the deeds he voluntarily declared himself to be fully satisfied, in the presence of the subscribing witnesses.

The facts found by the jury were, that the defendant Patsy, by her conduct to the deceased, induced him to suppose that she would marry him, and that this encouragement or inducement was the only consideration she gave for the land, except his boarding; but that she never made him any promise of marriage. That he had urged her to accept the land before she agreed to take it, and had declared to her that he did not expect to receive any consideration from her, but wished her to accept it as a gift; and that at the time he executed the deeds, he declared he did not expect that she would marry him. That she was advised by her friends to take the land before she agreed to accept it; and that, after the execution of the deeds, she offered to return to him the land, but he would not receive it.

That Brooks boarded in her house, and never paid her any thing therefor, except the land. The jury also found the will of the deceased, and the devise to the complainant.

The decree of the court below, upon argument, was, that the defendants should convey the land to the complainant, and that the complainant should pay the defendants the amount of Brooks's board, and the taxes which had been paid by the defendants, with interest.

[*179] *Which decree was, by this court, without argument, reversed, and the complainant's bill dismissed, with costs.

Decree reversed.

Diggs and Keith v. Wolcott.

4 C. 179.

A court of the United States cannot enjoin proceedings in a State court.

This was an appeal from a decree of the circuit court for the district of Connecticut, in a suit in chancery.

The appellants, Diggs and Keith, had commenced a suit at law against Alexander Wolcott, the appellee, in the county court for the county of Middlesex, in the State of Connecticut, upon two promissory notes given by Wolcott to one Richard Matthews, for the purchase of lands in Virginia, and by him indorsed to the appellants; whereupon Wolcott filed a bill in chancery in the superior court of the State, against the appellants Diggs and Keith, and also against Robert Young and Richard Matthews, praying that Diggs and Keith might be compelled to give up the two notes to be cancelled, or be perpetually enjoined from proceeding at law for the recovery thereof, &c.

This suit in chancery was removed by the appellants from the State court into the circuit court of the United States for the district of Connecticut, where it was decreed that Diggs and Keith should, on or before a certain day, deliver the notes to the clerk of the court, and in default thereof should forfeit and pay to Wolcott $1,500; and that they should be perpetually enjoined, &c., and that Robert Young should repay to the appellee the amount of principal and interest which the latter had paid on account of the purchase of the lands; and that the appellee should deliver up to the clerk the surveys of the lands, and the bond of conveyance; and in default thereof should pay to R. Young the sum of $20,000.

* The case was argued upon its merits by *C. Lee* and [* 180] *Swann*, for the appellants, and by *P. B. Key*, for the appellee; but the court being of opinion that a circuit court of the United States had not jurisdiction to enjoin proceedings in a State court, reversed the decree.

7 H. 612.

Wood v. Lide.

4 C. 180.

If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return.

The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered.

Error to the circuit court for the district of Georgia.

The writ of error was dated the 23d of December, 1805, and returnable to February term, 1806; the citation also bore the same date, and commanded the defendant in error to appear at the same term. The writ of error was filed in the clerk's office of the court below on the same 23d of December. The judgment below was not signed until the 4th day of January, 1806. The writ of error was not returned and filed in the clerk's office of the supreme court until the 18th of March, 1806, after the court had closed its session.

P. B. Key, for the plaintiff in error, suggested that in such a case the writ of error ought to be dismissed of course.

The Court, however, inclined to be of a contrary opinion, but informed Key that they would give him an opportunity to show the contrary.

On a subsequent day he contended that the writ could not be returned at any other term than that to which it was returnable, and to which the defendant in error had been cited to appear.

[*181] *The Chief Justice stated that there had been some difference of opinion among the judges, which arose from their not understanding perfectly the facts of the case.

If the writ of error had been served when it was not in force, that is, after its return day, such service would have been void. But if served while in force, a return afterwards will be good.

The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered. Laws U. S. vol. 1, p. 63, s. 23, (1 Stats. at Large, 85.)

If it be so served before the return day, the service is good.

In the case cited from 4 Dall. 21, Blair *v.* Miller, it does not appear which party made the motion, nor whether there was an appearance for the opposite party.

In the present case, the writ of error having been served when in full force, and the writ of error returned, although not at the first term, the appearance of the defendant in error has waived all objection to the irregularity of the return.

The judgment was affirmed.

7 P. 144; 6 H. 81.

FEBRUARY TERM, 1808.

THE FOLLOWING JUDGES ATTENDED AT THIS TERM, NAMELY,

HON. JOHN MARSHALL, CHIEF JUSTICE.
HON. WILLIAM CUSHING,
HON. SAMUEL CHASE,
HON. BUSHROD WASHINGTON,
HON. WILLIAM JOHNSON,
HON. BROCKHOLST LIVINGSTON, AND
HON. THOMAS TODD,[1]
} ASSOCIATE JUSTICES.
CAÆSAR A. RODNEY, Attorney-General.

*FITZSIMMONS v. THE NEWPORT INSURANCE COMPANY. [*185]

4 C. 185.

A ship warranted to be American, is impliedly warranted to conduct as American, and an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character.

An intention to enter a blockaded port is not a breach of blockade — there must also be an attempt to enter, knowing the fact of blockade.

If a sentence of a vice-admiralty court be taken as conclusive of the particular facts which it alleges, those facts not amounting to a cause of condemnation, it does not falsify a warranty of neutrality.

ERROR to the circuit court of the United States for the district of Rhode Island, in an action on a policy of insurance. All the material facts sufficiently appear in the opinion of the court.

Dallas and *C. Lee*, for the plaintiff.

[1] The appointment of Judge Todd was under the act of congress of 24th of February, 1807, s. 5, (2 Stats. at Large, 421,) directing that the supreme court should consist of a chief justice and six associate justices.

Rawle, for the defendant.

[* 197] * MARSHALL, C. J., delivered the opinion of the court as follows: namely,

This suit is instituted to recover from the underwriters the amount of a policy insuring the brig John, on a voyage from Charleston to Cadiz. The vessel was captured on her passage by a British squadron then blockading that port, was sent into Gibraltar for adjudication, and was there condemned by the court of vice-admiralty as lawful prize. The assured warrants the ship to be American property; and the defence is, that this warranty is conclusively falsified by the sentence of condemnation.

The points made for the consideration of the court are,

1. Is the sentence of a foreign court of admiralty conclusive evidence, in an action against the underwriters, of the facts it professes to decide? If so,

2. Does this sentence upon its face, falsify the warranty contained in the policy? If not,

3. Does the special verdict exhibit facts which falsify the warranty?

The question on the conclusiveness of a sentence of a foreign court of admiralty having been more than once elaborately argued, the court reluctantly avoids a decision of it at present. But there are particular reasons which restrain one of the judges from giving an opinion on that point, and another case has been mentioned, in which it is said to constitute the sole question. In that case, it will of course be determined.

[* 198] * Passing over the consideration of the first point, therefore, the court proceeded to inquire whether this cause could be decided on the second and third points.

Admitting for the present that the sentence of a foreign court of admiralty is conclusive, with respect to what it professes to decide, does this sentence falsify the warranty contained in this policy, that the brig John is American property?

The sentence declares "the said brig to have been cleared out for Cadiz, a port actually blockaded by the arms of our sovereign lord the king, and that the master of said brig persisted in his intention of entering that port, after warning from the blockading force not to do so, in a direct breach and violation of the blockade thereby notified."

The sentence, then, does not deny the brig to have been American property. But it is contended by the counsel for the underwriters, that a ship warranted to be American is impliedly warranted to con-

duct herself during the voyage as an American, and that an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character.

This position cannot be controverted.

It remains, then, to inquire, whether the sentence proves the brig John to have violated the laws of blockade; that is, whether the cause of condemnation is alleged in such terms as to show that the vessel had forfeited her neutral character, or in such terms as to show its insufficiency to support the sentence.

The fact of clearing out for a blockaded port, is in itself innocent, unless it be accompanied with knowledge of the blockade. The clearance, therefore, is not considered as the offence; the persisting in the intention to enter that port, after warning by the blockading force, is the ground of the sentence.

Is this intention, evidenced by no fact whatever, a breach of blockade? This question is to be decided by *a reference [*199] to the law of nations, and to the treaty between the United States and Great Britain.

Vattel, b. 3, s. 117, says, "All commerce with a besieged town is entirely prohibited. If I lay siege to a place, or even simply blockade it, I have a right to hinder any one from entering, and to treat as an enemy whoever attempts to enter the place, or carry any thing to the besieged, without my leave."

The right to treat the vessel as an enemy is declared, by Vattel, to be founded on the attempt to enter, and certainly this attempt must be made by a person knowing the fact.

But this subject has been precisely regulated by the treaty between the United States and Great Britain, which was in force when this condemnation took place. That treaty contains the following clause:

"And whereas it frequently happens that vessels sail for a port or place belonging to an enemy, without knowing that the same is either besieged, blockaded, or invested; it is agreed that every vessel so circumstanced may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless after notice she shall again attempt to enter; but she shall be permitted to go to any other port or place she may think proper."

This treaty is conceived to be a correct exposition of the law of nations; certainly it is admitted by the parties to it, as between themselves, to be a correct exposition of that law, or to constitute a rule in the place of it.

Neither the law of nations nor the treaty admits of the condemnation of the neutral vessel for the intention to enter a blockaded

port, unconnected with any fact. Sailing for a blockaded port, knowing it to be blockaded, has been in some English cases construed into an attempt to enter that port, and has, therefore, been adjudged a breach of the blockade from the departure of the vessel.

[*200] *Without giving any opinion on that point, it may be observed, that in such cases the fact of sailing is coupled with the intention, and the sentence of condemnation is founded on an actual breach of blockade. The cause assigned for condemnation would be a justifiable cause, and it would be for the foreign court alone to determine whether the testimony supported the allegation that the blockade was broken. Had this sentence averred that the brig John had broken the blockade, or had attempted to enter the port of Cadiz after warning from the blockading force, the cause of condemnation would have been justifiable, and without controverting the conclusiveness of the sentence, the assured could not have entered into any inquiry respecting the conduct of the vessel. But this is not the language of the sentence. An attempt to enter the port of Cadiz is not alleged, but persisting in the intention, after being warned not to enter it, is alleged as the cause of condemnation. This is not a good cause under the treaty. It is impossible to read that instrument, without perceiving a clear intention in the parties to it, that after notice of the blockade, an attempt to enter the port must be made, in order to subject the vessel to confiscation. By the language of the treaty it would appear that a second attempt, after receiving notice, must be made, in order to constitute the offence which will justify a confiscation. "It is agreed," says that instrument, "that every vessel so circumstanced," that is, every vessel sailing for a blockaded port, without knowledge of the blockade, "may be turned away from such port or place, but she shall not be detained, nor her cargo, if not contraband, be confiscated, unless, after notice, she shall again attempt to enter."

These words strongly import a stipulation that there shall be a free agency on the part of the commander of the vessel, after receiving notice of the blockade, and that there shall be no detention nor condemnation, unless, in the exercise of that free agency, a second attempt to enter the invested place shall be made.

It cannot be necessary to state that testimony which would amount to evidence of such second attempt. Lingering about the

[*201] place, as if watching for an opportunity *to sail into it, or the single circumstance of not making immediately for some other port, or possibly obstinate and determined declarations of a resolution to break the blockade, might be evidence of an attempt, after warning, to enter the blockaded port. But whether these cir-

cumstances, or others, may or may not amount to evidence of the offence, the offence itself is attempting again to enter, and "unless, after notice, she shall again attempt to enter," the two nations expresaly stipulate "that she shall not be detained, nor her cargo, if not contraband, be confiscated." It would seem as if, aware of the excesses which might be justified, by converting intention into offence, the American negotiator had required the union of fact with intention to constitute the breach of a blockade.

The cause of condemnation, then, as described in this sentence, is one which, by express compact between the United States and Great Britain, is an insufficient cause, unless the intention was manifested in such manner, as, in fair construction, to be equivalent to an attempt to enter Cadiz, after knowledge of the blockade. This not being proved by the sentence itself, the parties are let in to other evidence.

However conclusive, then, the sentence may be, of the particular facts which it alleges, those facts not amounting, in themselves, to a justifiable cause of condemnation, the court must look into the special verdict, which explains what is uncertain in the sentence. The special verdict shows that the vessel was seized on her approaching the port of Cadiz, without previous knowledge of the blockade; that she never was turned away, and "permitted to go to any other port or place;" that she was "detained" for several days, and then sent in for adjudication, without being ever put into the possession of her captain and crew, so as to enable her either "again to attempt to enter" the port of Cadiz, or to sail for some other port; that while thus detained, the commander of the blockading squadron drew the captain of The John into a conversation which must be termed insidious, since its object was to trepan him into expressions which might be construed into evidence of an intention to sail for Cadiz, should he be liberated; *that availing himself of some [*202] equivocal, unguarded, and perhaps indiscreet answers on the part of the captain, the vessel was sent in for adjudication; and on those expressions was condemned.

This court is of opinion that these facts do not amount to an attempt again to enter the port of Cadiz, and, therefore, do not amount, under the treaty between the United States and Great Britain, to a breach of the blockade of Cadiz. The sentence of the court of vice-admiralty in Gibraltar, therefore, is not considered as falsifying the warranty that the brig John was American property, or as disabling the assured from recovering against the underwriters in this action, and the testimony in the case shows that the blockade was not broken.

The judgment of the circuit court is to be reversed, with costs, and it is to be certified to that court, that judgment is to be entered on the special verdict for the plaintiff.

Judgment reversed.

4 C. 434.

Marshall v. The Delaware Insurance Company.

4 C. 202.

The right to abandon depends on the actual state of the loss at the time of the abandonment, not upon the information concerning the loss then in the possession of the assured. Though a capture, and possession under it, constitute a technical total loss, and justify an abandonment, yet the right to abandon is terminated by a final decree of restitution, though the decree had not been actually executed when the offer to abandon was made.

Error to the circuit court of the United States for the district of Pennsylvania, in an action for a total loss, on a policy of insurance on the Brig Rolla, her cargo and freight.

The material facts stated were, that the Brig Rolla, a neutral vessel, while prosecuting the voyage insured, was captured by a belligerent cruiser, and libelled as prize of war. On the 9th of July, 1806, a final sentence in favor of the vessel and cargo was passed, and on the 19th of the same month, about 1 o'clock P. M., restitu-
[*203] tion was made. On the 17th of July, the assured in *New York received information of the capture, and immediately gave orders to his agent in Philadelphia to abandon to the underwriters. In pursuance of these orders, the offer to abandon was made on the morning of the 19th.

The judgment of the court below was for the defendants.

Hopkinson and *Ingersoll*, for the plaintiff.

Dallas and *Rawle*, for the defendant.

[*205] *Marshall, C. J., after stating the facts of the case as above, delivered the opinion of the court as follows:

[*206] *The question submitted to the consideration of the court is this: is the assured entitled to recover for a partial, or for a total loss?

In support of the claim for a total loss, two points have been made:

1st. That the state of information at the time of the abandonment, not the state of the fact, must decide the right of the assured to abandon.

If this be otherwise, then, it is contended,

2d. That the right to abandon is coextensive with the detention, which continued until restitution was made in fact, and that restitution in fact, though made on the same day, was posterior in point of time to the abandonment.

1. Does the right to abandon depend on the fact, or on the information of the parties?

The right to abandon is founded on an actual or legal total loss. It appears to the court to consist with the nature of the contract, which is truly stated to be a contract of indemnity, that the real state of loss at the time the abandonment is made, is the proper and safe criterion of the rights of the parties. Might they depend absolutely on the state of information, a seizure which scarcely interrupted the voyage, might be, and frequently would be, converted into a total loss, and the contests respecting the real state of information might be endless. Intelligence of capture and of restitution might be received at the same time, and the insured might suppress the one and act upon the other.

This point came under the consideration of the court in the case of Rhinelander *v.* The Insurance Company of Pennsylvania, in which case it was said, that "where a belligerent has taken full possession of a vessel as prize, and continues that possession to the time of the abandonment, there exists, in point of law, a total loss." The court, in delivering this opinion, understood itself to require, that the continuance of the possession *up to the [*207] time of the abandonment, or a technical total loss incurred notwithstanding the restoration, was necessary to justify a recovery as for a total loss.

In considering the second point, the court proceeded to inquire whether the technical total loss on which the right to abandon depended, was terminated by the decree of restitution, or continued until that decree was carried into execution, and restitution was made in fact.

The real object of the policy is not to effect a change in property, but to indemnify the insured. Whenever, therefore, only a partial loss is sustained by one of the perils insured against, the original owner of the property retains it, prosecutes his voyage, and recovers for his partial loss.

But the voyage may be really broken up, without the destruction of the vessel and cargo. A detention by a foreign prince, either by embargo or capture, may be of such long duration as to defeat the voyage. This is a peril insured against, and of its continuance no certain estimate can be made. In the case of capture, it is, for the time, a total loss, and no person can confidently say that the loss will not finally be total. So of an embargo. Its duration cannot be measured, and it may destroy the object of the voyage. These detentions, therefore, are, for the time, total losses, and they furnish reasonable ground for the apprehension, that their continuance may be of such duration as to break up the voyage, or ruin the assured, by keeping his property out of his possession. Such a case, therefore, upon the true principles of the contract, has been considered as justifying an abandonment, and a recovery for a total loss.

But when a final decree of restitution, from which it is admitted that no appeal lies, has been awarded, the peril is over. On no reasonable calculation can it be supposed that such a delay of restitution will ensue, as from that time to break up the voyage. There is no reason to presume a subsequent detention on the part of

[*208] *the foreign prince. There is no motive for such detention. The master of the captured vessel may perhaps not be ready to receive possession, and the delay may proceed from him. At any rate, without some evidence that the peril was not actually determined, the court cannot consider it as continuing after the sentence was pronounced. A technical total loss originates in the danger of a real total loss. The court cannot suppose such a danger to have existed after a final sentence of acquittal, unless some order of court relative to a reconsideration could be shown, or it should appear that some other delays were interposed by the court which had pronounced the sentence, or by the sovereign of the captor.

Had the facts on which this question depends been known at New York and Philadelphia as they occurred, could it have been said that there existed a technical total loss? After a decree of restitution, could it be said that while means were taking to carry that decree into execution, while the mandate for restitution was passing from the court to the vessel, the assured had a right to elect to consider his vessel as lost, and to abandon to the underwriters? To this court it seems that the right to make such an election, at such a time, would be inconsistent with the spirit of the contract, and that the technical total loss was terminated by the decree of restitution, unless something subsequent to that decree could be shown to prove the continuance of the danger, or of an adversary detention.

Nothing in this opinion is intended to extend to the case where a cargo may be lost, without the loss of the vessel.

There is no error in the judgment of the circuit court of Pennsylvania, and it is to be affirmed, with costs.

Judgment affirmed.

3 W. 183; 12 P. 378.

*M'ILVAINE v. COXE'S LESSEE. [*209]

4 C. 209.

The several States composing the Union, became entitled, on the 4th of July, 1776, to all the rights and powers of sovereign States, so far at least as respects their internal regulations; and among those rights was that of the allegiance of their citizens.

By an act of the 4th of October, 1776, the State of New Jersey asserted its right to the allegiance of all persons born, and then residing within the territory of the State, and as D. C. was there born, and continued to reside there until 1777, he was a citizen of the State.

His leaving the State afterwards, and actually adhering to the side of the crown, did not render him an alien.

Nor did the treaty of peace of 1783[1] have that effect.

THIS was a writ of error to the circuit court of the United States for the district of New Jersey, to reverse a judgment given for the plaintiff below in an action of ejectment. The material facts were as follows:

The ejectment is brought for a messuage and 200 acres of land situated in Trenton, in New Jersey.

Daniel Coxe, the son, conveyed to John Redman Coxe, lessor of the plaintiff, who had previous notice of the defendant's claim.

The premises are part of the estate of Rebecca Coxe, deceased, and are of the value of $5,000.

Rebecca Coxe died at Trenton, in 1802, seised in fee of the premises, intestate and without issue.

In the year 1783, and before that time, she was a citizen of New Jersey, and so continued until her death. She left no brother or sister, but there were children of her two brothers, Daniel and William, as follows, namely:

1. Her brother Daniel, who died about 47 years ago, had issue Daniel Coxe (under whom the lessor of the plaintiff claims) and Grace Kempe, (widow of John Tabor Kempe, deceased,) both now living.

2. Her brother, William, who died in 1801, left issue five children, namely: John, Tench, William, Daniel William, and a daughter, Mary, all now living; also the following grandchildren, namely: children of his daughter Sarah, deceased, (late wife of Andrew Allen,) that is to say, Margaret, wife of George Hammond, Ann, Andrew, Elizabeth, Maria, John, and Thomas; and of his daughter Rebecca M'Ilvaine, deceased, named Rebecca Coxe M'Ilvaine.

Daniel Coxe, who conveyed to the lessor of the plaintiff, was born in New Jersey, where he resided from his birth until some time in the year 1777, when he removed to the city of Philadel-

[1] 8 Stats. at Large, 80.

phia, while, or shortly before it was in the possession of the British troops.

From the time they took possession of the city in 1777, he has never resided in any place within the jurisdiction of the United States, but has resided in places under the actual jurisdiction and government of the king of Great Britain, and at the time of Rebecca Coxe's death he was residing and domiciliated with his wife and four children at London.

In the year 1775, and long before, he was more than twenty-one years of age, was a member of the king's council of New Jersey, and a colonel of the provincial militia.

In the years 1778 and 1779 he exercised a civil office in Philadelphia under the authority of the king of Great Britain.

When the army evacuated Philadelphia, he followed it to New York, where he remained exercising a civil office under the king, until the final evacuation of that city by the British troops in 1783; until which time he remained possessed of his commissions and offices of member of the council and colonel of the militia, nor does it appear that he has since resigned either of them. He has never taken an oath of allegiance to the United States, or either of them, or of abjuration of the king of Great Britain, nor has he by any overt act ever exhibited himself as a citizen of the United States, or either of them. But between the signing of the definitive treaty of peace, and the death of Rebecca Coxe, he has done the following acts, namely:

1. He has executed divers writings stating himself to be of Great Britain, or of some other place in the British dominions.

2. He has for several years carried on trade and commerce as a British, and not as an alien, merchant, with all the rights and privileges belonging to a British merchant, by the laws of Great Britain.

3. He has held lands in England as a trustee.

4. Before and since the death of Rebecca Coxe, he has received a pension from the king of Great Britain, in consideration of his loyalty and attachment to the British king and government, and of his losses by reason thereof.

5. He did, soon after the treaty of peace, apply by petition to the commissioners to inquire into the losses by loyalists, &c., under certain statutes, viz.: 23 Geo. 3, c. 80; 25 Geo. 3, c. 76; 27 Geo. 3, c. 29; 28 Geo. 3, c. 40; 29 Geo. 3, c. 62, or some or one of them, and by the same petition he did set forth that he was a British subject, who had suffered for his adherence to the British government, and prayed compensation therefor, &c. And he did receive compensation

for his losses and sufferings, and for his estates and possessions, as a loyalist of the first and third titles or classes of the statutes, or some or one of them.

6. He did in 1795, or afterwards, and before the death of the said Rebecca Coxe, apply, as a British subject, to the commissioners under the 6th article of the treaty of amity, &c. of 19th November, 1794, and in his petition styled himself "Daniel Coxe, of London, in the kingdom of Great Britain," and stated that "he then was, and from his birth ever had been, a subject of the king of Great Britain, and under the allegiance of the said king."

An inquisition was taken in the county of Hunterdon, and State of New Jersey, August 1, 1778, by which it was found that he did, about the 9th of April, 1778, join the arms of the king of Great Britain, and did aid and abet them by acting as a magistrate of police, &c., against the form of his allegiance to the State of New Jersey, and against the peace of the same. Final judgment was entered on the said inquisition at October term, 1778, whereby all his real and personal estate in the county of Hunterdon was forfeited and vested in the State of New Jersey. And at February term, 1779, process was ordered to be issued to the commissioners of said county for the sale of the said real estate.

Some time in 1778 or 1779, he was attainted of treason against the State of Pennsylvania, in consequence of not surrendering pursuant to a proclamation issued by the supreme executive council of that State, dated 21st July, 1778, and of the said treason and attainder was pardoned on the 6th of December, 1802, by the governor of Pennsylvania.

By virtue of the said inquisition, judgment and process in New Jersey, his real estate in the county of Hunterdon was seized and sold, and is now held by the purchasers thereof under that State.

The cause was twice argued. The first time by *W. Tilghman* and *Ingersoll*, for the plaintiff, and *Rawle* and *Stockton*, for the defendant. The arguments are reported in 2 C. 280. The second time by *Duponceau* and *Ingersoll*, for the plaintiff, and *Rawle* and *E. Tilghman*, for the defendant.

[*211] *CUSHING, J., delivered the opinion of the court, as follows:[1]

The court deems it unnecessary to declare an opinion upon a point which was much debated in this cause, whether a real British subject

[1] JOHNSON, J. did not vote upon this question; and TODD, J. gave no opinion, as he had not been present at the argument.

born before the 4th of July, 1776; who never from the time of his *birth, resided within any of the American colonies or States, can upon the principles of the common law, take lands by descent in the United States; because Daniel Coxe, under whom the lessor of the plaintiff claims, was born in the province of New Jersey, long before the declaration of independence, and resided there until some time in the year 1777, when he joined the British forces.

Neither does this case produce the necessity of discriminating very nicely the precise point of time when *Daniel [*212] Coxe lost his right of election to abandon the American cause, and to adhere to his allegiance to the king of Great Britain; because he remained in the State of New Jersey, not only after she had declared herself a sovereign State, but after she had passed laws by which she pronounced him to be a member of, and in allegiance to, the new government. The court entertains no doubt that after the 4th of October, 1776, he became a member of the new society, entitled to the protection of its government, and bound to that government by the ties of allegiance.

This opinion is predicated upon a principle which is believed to be undeniable, that the several States which composed this Union, so far at least as regarded their municipal regulations, became entitled, from the time when they declared themselves independent, to all the rights and powers of sovereign States, and that they did not derive them from concessions made by the British king. The treaty of peace contains a recognition of their independence, not a grant of it. From hence it results, that the laws of the several State governments were the laws of sovereign States, and as such were obligatory upon the people of such State, from the time they were enacted. We do not mean to intimate an opinion that even a law of a State, whose form of government had been organized prior to the 4th of July, 1776, and which passed prior to that period, would not have been obligatory. The present case renders it unnecessary to be more precise in stating the principle; for although the constitution of New Jersey was formed previous to the general declaration of independence, the laws passed upon the subject now under consideration were posterior to it.

Having thus ascertained the situation of Daniel Coxe, on the 4th of October, 1776, let us see whether it was in any respect changed by his subsequent conduct, in relation to the new government. Without expressing an opinion upon the right of expatriation as founded on the common law, or upon the application of that principle to a person born in the State of New Jersey, before its separation from the mother country, we think it conclusive upon the point, that the legislature of that State, * by the most unequivocal [*213]

declarations, asserted its right to the allegiance of such of its citizens as had left the State, and had not attempted to return to their former allegiance.

The act of the 5th of June, 1777, contains an express declaration that all such persons were subjects of the State, who had been seduced by the enemy from their allegiance. The law speaks of them as fugitives, not as aliens, and they are invited, not to become subjects, but to return to their duty, which the legislature clearly considered as still subsisting and obligatory upon them.

The inquiry which the jury is directed to make by the act of the 18th of April, 1778, in order to lay a foundation for the confiscation of the personal estates of these fugitives is, whether the person had, between the 4th of October, 1776, and the 5th of June, 1777, joined the armies of the king of Great Britain, or otherwise offended against the form of his allegiance to the State. The 7th section of this law is peculiarly important, because it provides not only for past cases, which had occurred since the 5th of June, 1777, but for all future cases, and in all of them the inquiry is to be, whether the offender has joined the armies of the king, or otherwise offended against the form of his allegiance to the State.

During all this time, the real estates of these persons remained vested in them; and when by the law of the 11th of December, 1778, the legislature thought proper to act upon this part of their property, it was declared to be forfeited for their offences, not escheatable on the ground of alienage. This last act is particularly entitled to attention, as it contains a legislative declaration of the point of time when the right of election to adhere to the old allegiance ceased, and the duties of allegiance to the new government commenced. Those who joined the enemy between the 19th of April, 1775, and the 4th of October, 1776, (when an express declaration upon the subject was made,) and who had not since returned and become subjects in allegiance to the new government, by taking the oaths of abjuration and allegiance, are pronounced guilty of high treason, not for the purpose of affecting them personally, which would have [*214] *been most unjust; but with a view to the confiscation of their estates. And consistent with this distinction, the jury are to inquire in respect to these persons, not as in the case of those who had left the State after the 4th of October, 1776, whether they had offended against the form of their allegiance, but whether they are offenders within this act, that is, by having joined the enemy between the 19th of April, 1775, and the 4th of October, 1776, and not having returned and become subjects in allegiance to the State.

Having taken this view of the laws of New Jersey upon this subject, it may safely be asserted that prior to the treaty of peace, it would not have been competent, even for that State to allege alienage in Daniel Coxe in the face of repeated declarations of the legitimate authority of the government, that he continued to owe allegiance to the State, notwithstanding all his attempts to throw it off. If he was an alien, he must have been so by the laws of New Jersey, but those laws had uniformly asserted, that he was an offender against the form of his allegiance to the State. How, then, can this court, acting upon the laws of New Jersey, declare him an alien? The conclusion is inevitable, that, prior to the treaty of peace, Daniel Coxe was entitled to hold, and had a capacity to take lands, in New Jersey by descent.

But it is insisted that the treaty of peace, operating upon his condition at that time, or afterwards, he became an alien to the State of New Jersey in consequence of his election, then made to become a subject of the king, and his subsequent conduct confirming that election. In vain have we searched that instrument for some clause or expression, which by any implication could work this effect.

It contains an acknowledgment of the independence and sovereignty of the United States, in their political capacities, and a relinquishment on the part of his Britannic Majesty, of all claim to the government, propriety, and territorial rights of the same. These concessions amounted, no doubt, to a formal renunciation of all claim to the allegiance of the citizens of the United States. But the question who were at that period citizens of the * United States is not decided, or in the slightest degree alluded to, in this instrument; it was left necessarily to depend upon the laws of the respective States, who in their sovereign capacities had acted authoritatively upon the subject. It left all such persons in the situation it found them, neither making those citizens, who had by the laws of any of the States been declared aliens, nor releasing from their allegiance any who had become, and were claimed, as citizens. It repeals no laws of any of the States which were then in force and operating upon this subject, but on the contrary it recognizes their validity by stipulating that congress should recommend to the States, the reconsideration of such of them as had worked confiscations. If the laws relating to this subject were at that period, in the language of one of the counsel, temporary and *functi officio*, they certainly were not rendered so by the terms of the treaty, nor by the political situation of the two nations, in consequence of it. A contrary doctrine is not only inconsistent with the sovereignties of the States, anterior to, and independent of, the treaty, but its indiscriminate

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adoption might be productive of more mischief than it is possible for us to foresee.

If, then, at the period of the treaty, the laws of New Jersey which had made Daniel Coxe a subject of that State were in full force, and were not repealed, or in any manner affected, by that instrument, if by force of these laws he was incapable of throwing off his allegiance to the State, and derived no right to do so by virtue of the treaty, it follows that he still retains the capacity which he possessed before the treaty, to take lands by descent in New Jersey, and, consequently, that the lessor of the plaintiff is entitled to recover.

Judgment must be affirmed, with costs.

3 P. 99, 242; 19 H. 393.

[*216] *THE UNITED STATES *v.* THE BRIG UNION, THE SLOOP SALLY and Cargo, and THE SLOOP DEBORAH and Cargo.

4 C. 216.

Though an appraisement, made by order of court, is not conclusive evidence of the amount in dispute in an admiralty case, yet it is generally the best evidence.

APPEALS from the circuit court of the United States for the district of Delaware. To show jurisdiction by reason of the amount in dispute, the appellants, without objection, examined a witness *viva voce*, as to the value of each subject. The appraisements, made by order of the district court, valued each subject at a less sum than $2,000.

[*217] *MARSHALL, C. J. The appraisement is not conclusive evidence of the value, but in this case it is the best evidence. It was made by officers of the court under its order, and was regularly returned and filed. It does not impeach the credibility of the witness now examined, for the value is a matter depending upon opinion, and with respect to which the judgments of men may honestly vary. The appraised value would have been the matter in dispute if the property had been delivered up to the claimants upon security given.

TODD, LIVINGSTON, WASHINGTON, CHASE and CUSHING, Justices, concurred.

JOHNSON, J., contrà. The appraisement was a thing not perfected. It was not acted upon, and might have been impeached.

The appeals were all dismissed for want of jurisdiction in this court.

No objection was made to the *viva voce* examination of the witness as to the value.

19 H. 393.

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* PAWLING and others *v.* The UNITED STATES. [*219]

4 C. 219.

On a demurrer to evidence, judgment will be given against the party demurring, if upon the evidence it would have been competent for a jury to have found a verdict against him, though the court may, on the whole, be of opinion that a verdict in his favor would have been more satisfactory.

ERROR to the district court of the United States for the district of Kentucky. The action was debt on bond; and the question at the trial, was, whether the writing was delivered absolutely as a bond, or only as an escrow. Evidence was given by the defendants in support of their plea that the writing was an escrow; to which evidence the plaintiffs demurred. The opinion of the court states the evidence.

Pope, for the plaintiffs.

Rodney, Attorney-General, for the United States.

* MARSHALL, C. J., delivered the opinion of the court as [*221] follows:

In this case two points are made for the consideration of the court.

It is contended by the plaintiffs in error,

1st. That judgment on the demurrers to evidence should have been rendered for the defendants in the court below.

2d. That Joseph Ballinger ought to have been admitted as a witness.

The general doctrine on a demurrer to evidence has been correctly stated at the bar. The party demurring admits the truth of the testimony to which he demurs, *and also those con- [*222] clusions of fact which a jury may fairly draw from that testimony. Forced and violent inferences he does not admit; but the testimony is to be taken most strongly against him, and such conclusions as a jury might justifiably draw the court ought to draw.

The point in issue between the parties was the delivery of the instrument on which the suit was instituted. The plaintiffs below contending that it was delivered, absolutely; the defendants that it was delivered as an escrow.

The bond, upon its face, purports to be delivered absolutely; and it is not to be doubted that obligees would be much more secure against fraud, if the evidence that the writing was delivered as an escrow appeared upon its face, than by admitting parol testimony of that fact. But the law is settled otherwise, and is not to be disturbed by this court.

The subscribing witnesses to the bond were examined to prove its delivery. Henry Pawling executed it at one time; the other defendants, Kennedy, Todd, and Adair, at a different time. With respect to Pawling, the testimony is as complete as can be required. William G. Bryant deposes that Pawling signed the bond, on condition that other persons, whom he named, should also sign it. The witness understood that if those other persons should not sign it, Pawling should be exonerated. Elijah Stapp, the other subscribing witness to the signature of Pawling, deposed that "he saw Pawling acknowledge it as his act and deed, upon condition that others, whom he mentioned, should also sign it."

These are the subscribing witnesses to the bond, and certainly a jury believing them could not have avoided declaring, by their verdict, that the bond was delivered on condition. That condition not having been performed, the bond, as to Pawling, remains an escrow.

[*223] The testimony, with respect to the other defendants, is less positive. The witness, John P. Wagnon, was *called in to attest the bond. Thomas Todd, one of the defendants, then sat down and inserted in the body of the bond the names of other persons who, he said, were also to execute the instrument which he then held in his hand.

Some distinction was taken at the bar between the case of Todd and that of the other defendants. But the court is of opinion that no such distinction exists. The other defendants said nothing. They did not even acknowledge their signatures. Todd holding the instrument in his hands, called upon the witness to take notice that "we" (in the plural) "acknowledge this instrument, but others are to sign it." The two other obligors being present, and making no other acknowledgment, are clearly to be considered as speaking through Todd, and executing the bond on the terms on which he executed it. Their condition, then, is the same. It is either an escrow or a writing obligatory with respect to all of them.

A jury might certainly have found the issue in favor of the plaintiffs

below, and a court would have been well satisfied with their verdict. But might they not, without going against evidence, have found the issue in favor of the defendants below?

When words are to be proved by witnesses who depend on their memory alone, the precise terms employed by the parties will seldom be recollected, and courts and juries must form their opinions upon the substance and upon all the circumstances. Now to what purpose did the defendants call upon the subscribing witness to take notice that others, as well as themselves, were to execute the writing? To what purpose did they qualify their acknowledgment with this declaration? It could not be in order to show that they depended on Ballinger to procure additional securities, for that was an affair between him and them, of which it was perfectly unnecessary to call on the witness to take notice, if it was to have no influence on the particular fact he was required to attest. There is certainly strong reason for believing that the obligors considered that declaration as *explaining and affecting the act with which they [* 224] connected it.

It is also of some importance that the defendant Todd had previously declared that he should not be apprehensive of becoming a security for Ballinger provided others, whom he named, should also become securities, and that he inserted the names of others in the bond, in the presence of the witness.

Although the judges who compose this court might not, perhaps, as jurors, be perfectly satisfied with this testimony, they cannot say that a verdict would not be received, or ought not to be received, which should find the issue in favor of the defendants below. They cannot say that such a verdict would be against evidence. Thinking so, the court is of opinion that the judgment on the demurrer ought to have been in favor of the the defendants below.

It is unnecessary to give any opinion on the second point. The judgment of the court for the district of Kentucky is to be reversed.

Judgment reversed.

12 W. 383; 13 H. 307.

GRANT v. NAYLOR.

4 C. 224.

A letter of credit, addressed to John and Joseph Naylor & Co., will not support an action by John and Jeremiah Naylor & Co.; and the plaintiffs cannot be allowed to prove by parol, that the letter was intended to be addressed to their firm, and that the variance arose from mistake.

ERROR to the circuit court of the United States for the District of Maryland, in an action of assumpsit founded on a letter of credit, in following words:

* "Baltimore, 6th April, 1795.

[*225] "Gentlemen,

"By the recommendation of Mr. Travis, I take the liberty to address you by my son Alexander, who visits England with a view of establishing connections in the commercial line there in the different manufactories and others. He is concerned with Mr. John Hackett, of this place, under the firm of Hackett & Grant. For their plan I refer to themselves. Have therefore only to add, that I will guarantee their engagements, should you think it necessary, for any transaction they may have with your house."

Evidence was also offered tending to prove that there was no commercial house at Wakefield, trading under the firm of John & Joseph Naylor; that Travis, mentioned in the letter, was the plaintiffs' agent; and that the letter was in fact intended for them. The evidence was excepted to, but admitted, and the jury found for the plaintiffs.

Martin, for the plaintiffs.

Ingersoll and *Harper*, for the defendants.

[*234] MARSHALL, C. J., delivered the opinion of the court, as follows:

In this case three points are made by the plaintiff in error on the letter which constitutes the basis of this action. He contends,

1st. That this letter being a collateral undertaking, and being addressed to John and Joseph Naylor & Co., the plaintiffs below cannot be admitted to prove by parol testimony that it was intended for, and is, an assumpsit to John and Jeremiah Naylor.

2d. That the undertaking was conditional, and required notice to be given to the writer of the intent and nature of his liability.

[*235] *3d. That it is confined to the shipments made during the year in which it was written.

On the first objection the court has felt considerable difficulty. That the letter was really designed for John and Jeremiah Naylor cannot be doubted, but the principles which require that a promise to pay the debt of another shall be in writing, and which will not permit a written contract to be explained by parol testimony, originate in a general and wise policy, which this court cannot relax so far as to except from its operation cases within the principles.

Already have so many cases been taken out of the statute of frauds, which seem to be within its letter, that it may well be doubted whether the exceptions do not let in many of the mischiefs against which the rule was intended to guard. The best judges in England have been of opinion that this relaxing construction of the statute ought not to be extended further than it has already been carried, and this court entirely concurs in that opinion.

On examining the cases which have been cited at the bar, it does not appear to the court that they authorize the explanation of the contract which is attempted in this case.

This is not a case of ambiguity.

It is not an ambiguity patent, for the face of the letter can excite no doubt.

It is not a latent ambiguity, for there are not two firms of the name of John and Joseph Naylor & Co. to either of which this letter might have been delivered.

It is not a case of fraud. And if it was, a court of chancery would probably be the tribunal which would, if any could, afford redress.

If it be a case of mistake, it is a mistake of the writer only, not of him by whom the goods were advanced, and who claims the benefit of the promise.

* Without reviewing all the cases which have been urged [* 236] from the bar, it may be said with confidence that no one of them is a precedent for this.

A letter addressed by mistake, it is admitted, to one house, is delivered to another. It contains no application or promise to the company to which it is delivered, but contains an application and a promise to a different company not existing at that place. The company to which it is delivered are not imposed upon with respect to the address, but knowing that the letter was not directed to them, they trust the bearer, who came to make contracts, on his own account. In such a case the letter itself is not a written contract between Daniel Grant, the writer, and John and Jeremiah Naylor, the persons to whom it was delivered. To admit parol proof to make it such a contract, is going further than courts have ever gone, where the writing is itself the contract, not evidence of a contract,

and where no preëxisting obligation bound the party to enter into it.

It being the opinion of a majority of the court that John and Jeremiah Naylor could not maintain their action on this letter, it becomes unnecessary to consider the other points which were made at the bar. It is the opinion of this court that the circuit court erred in directing the jury that the evidence given by the plaintiffs in that court was proper and sufficient to support the issue on their part. The judgment of the circuit court is, therefore, to be reversed, and the cause sent back for further trial.

Judgment reversed.

14 H. 446.

[*237] * WOODS AND BEMIS *v.* YOUNG.

4 C. 237.

IN this case it was ruled that the refusal of the court below to continue the case, could not be assigned for error.

9 W. 576; 1 P. 165.

[*239] * YOUNG *v.* PRESTON.

4 C. 239.

If a contract under seal be partly performed, and the execution of the residue prevented by the defendant, assumpsit upon a *quantum meruit*, for the work actually done, will not lie.

ERROR to the circuit court for the District of Columbia, in an action of assumpsit, upon a *quantum meruit* for work and labor. It appeared that the work was done in part performance of a sealed contract, the completion whereof was prevented by the defendant. The court below ruled that the plaintiff could recover.

Upon the opening of the case, this court, without argument, reversed the judgment.

On a subsequent day counsel were heard, and authorities
[*240] cited. * But notwithstanding these authorities, the court adhered to their first impression, some of the judges saying,
[*241] * that the plaintiff had a clear right of action upon the sealed instrument; he might aver in his declaration that he had, in

part, performed the work, and was ready to do the rest, but was prevented by the defendant. And whenever a man may have an action on a sealed instrument, he is bound to resort to it.

Judgment reversed.

Rose v. Himely.[1]

4 C. 241.

In every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court is examinable.

So is the question, whether the *res* was so situated as to be subject to the jurisdiction.

Whether a revolted colony is to be treated as a sovereign state, is a political question, to be decided by governments, not by courts of justice, and the courts of the United States must consider the ancient state of things as remaining, until the sovereignty of the revolted colony is acknowledged by the government of the United States.

Belligerent rights may be superadded to those of sovereignty. To which class any particular act belongs, the nature of the law and the proceedings under it, must determine.

In this case, from the nature of the laws, under which the seizure was made, they are territorial regulations, proceeding from the sovereign power, and intended to enforce sovereign rights, and the tribunal professing to execute them, must be considered as acting as an instance and not as a prize court.

Whatever may be the municipal law under which a tribunal acts, if it exercise a jurisdiction which its sovereign is not allowed by the laws of nations to confer, its decrees must be disregarded, out of the dominions of its sovereign.

The seizure, *de facto*, out of his dominions, will not give jurisdiction to a sovereign, over a thing never brought within them.

He cannot authorize a seizure, on the high seas, for a breach of a municipal regulation.

The sentence in this case being void the property was not changed; but the property having been brought to this country, which was its destination, the libellant must allow for freight, duties, insurance, and such other charges, as would have been borne by them if importers.

Appeal from a decree of the circuit court of the United States for the district of South Carolina. The material facts are stated in the opinion of the court.

C. Lee, *Harper*, *S. Chase, Jr.*, *Dallas*, *Rawle*, *Ingersoll*, and *Drayton*, for the libellant.

Duponceau, *E. Tilghman*, and *Martin*, for the respondent.

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[1] In Hudson v. Guestier, 6 C. 285; Marshall, C. J., says, the principle of this case is now overruled; and that only one judge concurred in his opinion.

[*268] * MARSHALL, C. J., delivered the opinion of the court.

This is a claim for a cargo of coffee, &c., which, after being shipped from a port in Santo Domingo, in possession of the brigands, was captured by a French privateer, and carried into Barracoa, a small port in the island of Cuba, where it was sold by the captor. The cargo, having been brought by the purchaser into the State of South Carolina, was libelled in the court of admiralty, by the original American owner. The purchaser defends his title by a sentence of condemnation pronounced by a tribunal sitting in Santo Domingo, after the property had been libelled in the court of this country; and by an order of sale made by a person styling himself delegate of the French government of Santo Domingo at St. Jago de Cuba.

The great question to be decided is —

Was this sentence pronounced by a court of competent jurisdiction?

At the threshold of this interesting inquiry, a difficulty presents itself, which is of no inconsiderable magnitude. It is this:

Can this court examine the jurisdiction of a foreign tribunal?

The court pronouncing the sentence, of necessity decided in favor of its jurisdiction; and if the decision was erroneous, that error, it is said, ought to be corrected by the superior tribunals of its own country, not by those of a foreign country.

This proposition certainly cannot be admitted in its full extent.

A sentence, professing on its face to be the sentence of a
[*269] judicial tribunal, if rendered by a self-constituted * body, or by a body not empowered by its government to take cognizance of the subject it had decided, could have no legal effect whatever.

The power of the court then is, of necessity, examinable to a certain extent by that tribunal which is compelled to decide whether its sentence has changed the right of property. The power under which it acts must be looked into; and its authority to decide questions, which it professes to decide, must be considered.

But although the general power by which a court takes jurisdiction of causes must be inspected, in order to determine whether it may rightfully do what it professes to do, it is still a question of serious difficulty, whether the situation of the particular thing on which the sentence has passed, may be inquired into, for the purpose of deciding whether that thing was in a state which subjected it to the jurisdiction of the court passing the sentence. For example; in every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court must be examinable. Is the question, whether the vessel condemned was in a

situation to subject her to the jurisdiction of that court, also examinable? This question, in the opinion of the court, must be answered in the affirmative.

Upon principle, it would seem that the operation of every judgment must depend on the power of the court to render that judgment; or in other words, on its jurisdiction over the subject-matter which it has determined. In some cases, that jurisdiction unquestionably depends as well on the state of the thing, as on the constitution of the court. If by any means whatever a prize court should be induced to condemn, as prize of war, a vessel which was never captured, it could not be contended that this condemnation operated a change of property. Upon principle, then, it would seem that, to a certain extent, the capacity of the court to act upon the thing condemned, arising from its being within, or without their jurisdiction, as well as the constitution of the court, may be considered by that tribunal which is to decide on the effect of the sentence.

* Passing from principle to authority, we find, that in the [* 270] courts of England, whose decisions are particularly mentioned, because we are best acquainted with them, and because, as is believed, they give to foreign sentences as full effect as are given to them in any part of the civilized world, the position that the sentence of a foreign court is conclusive with respect to what it professes to decide, is uniformly qualified with the limitation that it has, in the given case, jurisdiction of the subject-matter.

This general *dictum* is explained by particular cases.

The case of the Flad Oyen, 1 Rob. 135, was a vessel condemned by a belligerent court sitting in a neutral territory; consequently, the objection to that sentence turned entirely on the defect in the constitution of the court.

The Christopher, 2 Rob. 209, was condemned while lying in the port of an ally. The jurisdiction of the court passing the sentence was affirmed, but no doubt seems to have been entertained, at the bar, or by the judge himself, of his right to decide the question, whether a court of admiralty sitting in the country of the captor could take jurisdiction of a prize lying in the port of an ally. The decision of the tribunal at Bayonne, in favour of its own jurisdiction, was not considered as conclusive on the court of admiralty in England, but that question was treated as being perfectly open, and as depending on the law of nations.

The case of The Kierlighett, 3 Rob. 96, is of the same description with that of The Christopher, and establishes the same principle.

In the case of The Henrick and Maria, 4 Rob. 43, Sir W. Scott determined that a condemnation, by the court of the captor, of a

vessel lying in a neutral port, was conformable to the practice of nations, and, therefore, valid; but in that case the right to inquire whether the situation of the thing, the *locus in quo*, did not take it out of the jurisdiction of the court, was considered as unquestionable.

[*271] *The case of The Comet, 5 Rob. 285, stands on the same principles.

The Helena, 4 Rob. 3, was a British vessel captured by an Algerine corsair owned by the Dey, and transferred to a Spanish purchaser by a public act in solemn manner before the Spanish consul. The transfer was guaranteed by the Dey himself. The vessel was again transferred to a British purchaser under the public sanction of the judge of the vice-admiralty court of Minorca, after that place had surrendered to the British arms. On a claim in the court of admiralty by the original British owner, Sir W. Scott affirmed the title of the purchaser, but expressed no doubt of the right of the court to investigate the subject.

The manner in which this subject is understood in the courts of England, may then be considered as established on uncontrovertible authority. Although no case has been found in which the validity of a foreign sentence has been denied, because the thing was not within the ports of the captor, yet it is apparent that the courts of that country hold themselves warranted in examining the jurisdiction of a foreign court, by which a sentence of condemnation has passed not only in relation to the constitutional powers of the court, but also in relation to the situation of the thing on which those powers are exercised; at least so far as the right of the foreign court to take jurisdiction of the thing is regulated by the law of nations and by treaties. There is no reason to suppose that the tribunals of any other country whatever deny themselves the same power. It is, therefore, at present, considered as the uniform practice of civilized nations, and is adopted by this court as the true principle which ought to govern in this case.

In pursuing the inquiry, then, whether the tribunal erected in St. Domingo was acting on a case of which it had jurisdiction when The Sarah was condemned, this court will examine the constitutional powers of that tribunal, the character in which it acted, and the situation of the subject on which it acted.

[*272] *Admitting that the ordinary tribunal erected in St. Domingo was capable of acting as a prize court, and also of taking cognizance of offences against regulations purely municipal, it is material to inquire in which character it pronounced the sentence of condemnation in the case now under consideration.

In making this inquiry, the relative situation of St. Domingo and France must necessarily be considered.

The colony of St. Domingo, originally belonging to France, had broken the bond which connected her with the parent state, had declared herself independent, and was endeavoring to support that independence by arms. France still asserted her claim of sovereignty, and had employed a military force in support of that claim. A war *de facto* then unquestionably existed between France and St. Domingo. It has been argued that the colony, having declared itself a sovereign state, and having thus far maintained its sovereignty by arms, must be considered and treated by other nations as sovereign in fact, and as being entitled to maintain the same intercourse with the world that is maintained by other belligerent nations. In support of this argument, the doctrines of Vattel have been particularly referred to. But the language of that writer is obviously addressed to sovereigns, not to courts. It is for governments to decide whether they will consider St. Domingo as an independent nation, and until such decision shall be made, or France shall relinquish her claim, courts of justice must consider the ancient state of things as remaining unaltered, and the sovereign power of France over that colony as still subsisting.

It is not intended to say that belligerent rights may not be superadded to those of sovereignty. But admitting a sovereign who is endeavoring to reduce his revolted subjects to obedience, to possess both sovereign and belligerent rights, and to be capable of acting in either character, the manner in which he acts must determine the character of the act. If as a legislator he publishes a law ordaining punishments for certain offences, which law is to be applied by courts, the nature of the law, and of the proceedings under it, will * decide whether it is an exercise of belligerent [* 273] rights, or exclusively of his sovereign power; and whether the court, in applying this law to particular cases, acts as a prize court, or as a court enforcing municipal regulations.

Let the acts of the French government which relate to this subject be inspected.

The notification given by Mr. Pichon, the French charge d'affaires to the American government, which was published in March, 1802, interdicts all manner of intercourse with the ports of St. Domingo, in possession of the revolted negroes, and declares that "cruisers will arrest all foreign vessels attempting to enter any other port, and to communicate with any of the revolted negroes, to carry either ammunition or provisions to them. Such vessels," he adds, "shall be confiscated, and the commanders severely punished, as violating the rights of the French republic, and the law of nations."

It might be questioned, under this notice, whether vessels sailing on the high seas, having traded with one of the brigand ports, would be considered as liable to seizure and to confiscation, after passing the territorial jurisdiction of the government of St. Domingo. A free trade with that colony had been allowed, and the revocation of that license is made known to the government of the United States. To its revocation the ordinary rights of sovereignty alone were sufficient. The notification, however, refers to the order of the commander in chief of the French republic in St. Domingo; and that order would of course be examined as exhibiting more perfectly the extent and the nature of the rights which the French republic purposed to exercise.

The particular order which preceded this notification is in these words: "Every vessel, French or foreign, which shall be found by the vessels of the republic riding at anchor in the ports of the island not designated by these presents, or within the bays, creeks, [*274] and landing places on the coast, or under sail at a less *distance than two leagues from the coast, and communicating with the lands, shall be forfeited.

The next decree is dated the 22d of June, 1802, and the extract which is supposed to regulate this particular subject, is in these words: "Every vessel, French or foreign, which shall be found by the vessels of the republic anchored in one of the ports of the island not designated by the present decree, or in the bays, coves, or landings of the coast, or under sail at a less distance than two leagues from the coast, and communicating with the land, shall be arrested and confiscated."

Nothing can be more obvious than that these are strictly territorial regulations, proceeding from the sovereign power of St. Domingo, and intended to enforce sovereign rights. Seizure for a breach of this law is to be made only within those limits over which the sovereign claimed a right to legislate, in virtue of that exclusive dominion which every nation possesses within its own territory, and within such a distance from the land as may be considered as a part of its territory. This power is the same in peace and in war, and is exercised according to the discretion of the sovereign. The prohibition and the penalty are the same on French and foreign vessels.

This subject was again taken up in October, 1802, in an *arrete*, which in part regulates the coasting trade of the island. The 4th, 5th, and 6th articles of this decree respect foreign as well as French vessels, and subject them to confiscation in the cases which are there enumerated.

These are all of the same description with those stated in the

arrete of the 22d of June; and no seizure is authorized but of vessels found within two leagues of the coast.

The last decree is that which was issued by General Ferrand on the 1st of March, 1804. This deserves the more attention, because it is that on which the courts profess to found their sentence of condemnation, in the particular case under consideration, and because General * Ferrand uses expressions which clearly [*275] indicate the point of view in which all these *arretes* were contemplated by the government of the island.

The title of this *arrete* is, "An *arrete* relative to vessels taken in contravention of the dispositions of the laws and regulations concerning French and foreign commerce in the colony."

In stating the motives for this ordinance, it is said, "That some French agents in the neighboring and allied islands had mistaken the application of the laws and regulations concerning vessels taken in contravention, upon the coasts of St. Domingo occupied by the rebels, and had confounded those prizes with those which were made upon the enemy of the state." "Desiring to put an end to all the abuses which might result from this mistake, and which would be as injurious to the territorial sovereignty as to the rights of neutrality," the commander-in-chief, after some further recitals, which are not deemed material, ordains the law under which the tribunals have proceeded.

The distinction between seizures made in right of war, and those which are made for infractions of the commercial regulations established by the sovereign power of the State, is here taken in terms; and that legislation, which was directed against vessels contravening the laws and regulations concerning French and foreign commerce in the colony, is clearly of the latter description.

The first article of this *ordonnance* is recited in the sentence, as that on which the condemnation is founded. It is in these words:

"The port of Santo Domingo is the only one in the colony of St. Domingo that is open to the French and foreign commerce; in consequence, all vessels anchored in the bays, harbors, and landing places, on the coast occupied by the rebels; those cleared for the ports in their possession coming out with or without a cargo, and, generally, all vessels sailing in the territorial extent of the island, (except that from Cape Raphael to * Ocoa bay,) [* 276] found at a distance less than two leagues from the coast, shall be detained by the state vessels and privateers having our letters of marque, who shall conduct them, if possible, into the port of Santo Domingo, that the confiscation of the said vessels and cargoes may be pronounced."

As this article authorizes a seizure of those vessels only which are "sailing within the territorial extent of the island, found within less than two leagues of the coast," it is deemed by the court to be sufficiently evident that the seizure and confiscation are made in consequence of a violation of municipal regulation, and not in right of war. It is true, that the revolt of the colony is the motive for this exercise of sovereign power. Still it is an excercise of sovereign power, restricting itself within those limits which are the province of municipal law, not the exercise of a belligerent right.

The tribunal professing to carry this law into execution, though capable of sitting either as a prize or an instance court, must be considered in this case as acting in the character of an instance court, since it is in that character that it punishes violations of municipal law.

The Sarah was captured more than ten leagues from the coast of St. Domingo, was never carried within the jurisdiction of the tribunal of that colony, was sold at Barracoa, in the island of Cuba, and afterwards condemned as prize under the *arrete* of General Ferrand, which has been stated.

If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive. If it had no jurisdiction, the proceedings are *coram non judice*, and must be disregarded.

Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from
[* 277] whom the authority is derived, they are not regarded * by foreign courts. This distinction is taken upon this principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all.

Thus the sentence of a court sitting in a neutral territory, and instituted by a belligerent, has been declared not to change the property it professed to condemn; and thus the question whether a prize court sitting in the country of the captor could condemn property lying in a neutral port, has been fully examined, and although the jurisdiction of the court in such case was admitted, yet no doubt appears to have been entertained of the propriety of examining the question, and deciding it according to the practice of nations.

Since courts, who are required to decide whether the condemnation of a vessel and cargo by a foreign tribunal has effected a change of property, may inquire whether the sentence was pronounced by a court which, according to the principles of national law, could have

jurisdiction over the subject, this court must inquire whether, in conformity with that law, the tribunal sitting at St. Domingo to punish violations of the municipal laws enacted by its sovereign, could take jurisdiction of a vessel seized on the high seas, for infracting those laws, and carried into a foreign port.

In prosecuting this inquiry, the first question which presents itself to the mind is, what act gives an inchoate jurisdiction to a court?

It cannot be the offence itself. It is repugnant to every idea of a proceeding *in rem*, to act against a thing which is not in the power of the sovereign under whose authority the court proceeds; and no nation will admit that its property should be absolutely changed, while remaining in its own possession, by a sentence which is entirely *ex parte*. Those on board a vessel are supposed to represent all who are interested in it, and if placed in a situation which requires them to take notice of any proceedings against a vessel and cargo, and enables them to assert the rights of the interested, the cause is considered as being properly heard, and all concerned *are [*278] parties to it. But the owners of vessels navigating the high seas, or lying in port, cannot take notice of any proceedings which may be instituted against those vessels in foreign countries; and, consequently, such proceedings would be entirely *ex parte*, and a sentence founded on them never would be, and never ought to be, regarded.

The offence, then, alleged to have been committed by The Sarah could not be cognizable by the court of St. Domingo, until some other act was performed which should make the owners of the vessel and cargo parties to the proceedings instituted against them, and should place them within the legitimate power of the sovereign, for the infraction of whose laws they were to be confiscated. There must, then, be a seizure, in order to vest the possession of the thing in the offended sovereign, and enable his courts to proceed against it. This seizure, if made either by a civil officer, or a cruiser acting under the authority of the sovereign, vests the possession in him, and enables him to inquire, by his tribunals constituted for the purpose, into the allegations made against, and in favor of, the offending vessel. Those interested in the property which has been seized are considered as parties to this inquiry, and all nations admit that the sentence, whether correct or otherwise, is conclusive.

Will a seizure *de facto*, made without the territorial dominion of the sovereign under cover of whose authority it is made, give a court jurisdiction of a thing never brought within the dominions of that sovereign?

This is a question upon which considerable difficulty has been felt,

and on which some contrariety of opinion exists. It has been doubted whether proceedings, denominated judicial, are, in such a case, merely irregular, or are to be considered as absolutely void, being *coram non judice*. If merely irregular, the courts of the country pronouncing the sentence were the exclusive judges of that irregularity, and their decision binds the world; if *coram non judice*, the sentence is, as if not pronounced.

[* 279] * It is conceded that the legislation of every country is territorial; that beyond its own territory, it can only affect its own subjects or citizens. It is not easy to conceive a power to execute a municipal law, or to enforce obedience to that law without the circle in which that law operates. A power to seize for the infraction of a law is derived from the sovereign, and must be exercised, it would seem, within those limits which circumscribe the sovereign power. The rights of war may be exercised on the high seas, because war is carried on upon the high seas; but the pacific rights of sovereignty must be exercised within the territory of the sovereign.

If these propositions be true, a seizure of a person not a subject, or of a vessel not belonging to a subject, made on the high seas for the breach of a municipal regulation, is an act which the sovereign cannot authorize. The person who makes this seizure then, makes it on a pretext, which if true, will not justify the act, and is a marine trespasser. To a majority of the court it seems to follow, that such a seizure is totally invalid; that the possession, acquired by this unlawful act, is his own possession, not that of the sovereign; and that such possession confers no jurisdiction on the court of the country to which the captor belongs.

This having been the fact in the case of The Sărah, and neither the vessel, nor the captain, supercargo, nor crew, having ever been brought within the jurisdiction of the court, or within the dominion of the sovereign whose laws were infracted, the jurisdiction of the court over the subject of its sentence never attached, the proceedings were entirely *ex parte*, and the sentence is not to be regarded.

The case of The Helena, already cited, may at first view be thought a case which would give validity to any seizure wherever made, and would refer the legality of that seizure solely to the sovereign of the captor. But on a deliberate consideration of that case, the majority of the court is of opinion that this inference is not warranted

[* 280] by it. Several circumstances concurred in producing * the decision which was made, and those circumstances vary that case materially from this. The captured vessel was carried into port, and while in the power of the sovereign was transferred by his particular authority in solemn form.

In such a case, Sir William Scott conceived that a sentence of confiscation conformably with the laws of Algiers, was to be presumed. But his decision did not turn singly on this point. The vessel, after passing in this formal manner to a Spanish purchaser, had, with equal solemnity, been again transferred to a British purchaser: and the judge considered this second purchaser, with how much reason may perhaps be doubted, as in a better situation than the original purchaser. This case is badly reported; the points made by counsel on one side are totally omitted, and the opinion of the judge is not given with that clearness which usually characterizes the opinions of Sir William Scott. But the seizure was presumed to be made by way of reprisals for some breach of the treaty between the two powers, so that the possession of the captor was considered as legitimately the possession of his sovereign, and from the subsequent conduct of the Dey himself, a condemnation according to the usages of Algiers was presumed.

But in presuming a condemnation, this case does not, it is thought, dispense with the necessity of one; nor is it supposed, in presuming a legitimate cause of seizure, to declare that a seizure made without authority, by a commissioned cruiser, would vest the possession in the sovereign of the captor, and give jurisdiction to his courts.

If this case is to be considered as if no sentence of condemnation was ever pronounced, the property is not changed, and this court, having no right to enforce the penal laws of a foreign country, cannot inquire into any infraction of those laws. The property in this particular case was purchased under circumstances which exclude any doubt respecting its identity, and respecting the full knowledge of the purchaser of the nature of the title he acquired.

*The sentence of condemnation being considered as null [*281] and invalid, the property is unchanged, and, therefore, ought to be recovered by the libellants in the court below. But those libellants ought to account with the defendants for the freight, insurance, and duties on importation, and for such other expenses as would have been properly chargeable on themselves as importers; and each party is to bear his own costs.

The sentence of the circuit court is to be reversed, and also the sentence of the district court, so far as it contravenes this opinion, and the cause is to be remanded to the circuit court for the district of South Carolina, for a final decision thereon.

Livingston, J. Without expressing an opinion on the invalidity of a seizure on the high seas under a municipal regulation, if the property be immediately carried into a port of the country to which

the capturing vessel belongs, and there regularly proceeded against, I concur in the judgment just delivered, because The Sarah and her cargo were condemned by a French tribunal sitting at St. Domingo, without having been carried into that, or any other French port, and while lying in the port of Charleston, South Carolina, whither they had been carried, by and with the consent of the captor.

CUSHING and CHASE, JJ., concurred in opinion with Judge LIVINGSTON.

JOHNSON, J. This cause comes up on appeal from the circuit court of South Carolina, acting in the capacity of an instance court of admiralty. The doctrines which regulated the decision of the circuit court are not overruled by a majority of the bench; but the decree of that court is rescinded, because to three of the five judges who concur in sustaining the appeal, it appears that the property could not be condemned in the court of St. Domingo, while lying in a neutral port; and to the other two, that the capture on the high seas, for a breach of municipal regulation, was contrary to the law of nations, and, therefore, vested no jurisdiction in the court of [*282] St. Domingo. On the former doctrine it is not * necessary to make any observations, because in the case of the Sea Flower, argued together with this as one cause, and decided on the same day, that doctrine is expressly overruled. But on the latter point I think it proper, briefly, to state the reasons upon which I found my disapprobation, both of the doctrine and of its application to this case.

It would have been some relief to us in determining this question, had it been made a point by counsel, either in their argument in this court or in the court below; but it appears to have been wholly unnoticed by them.

Most of the difficulties which have occurred in the investigation of this case, appear to have resulted from an indistinct view of the nature, origin, and object of prize courts. Conducted by the same forms, and very generally blended in the same persons, it is not easy to trace upon the mind, the discriminating line between the instance and prize courts; yet the object of the institution of the latter court, when considered, strongly marks the distinguishing point between them. In its ordinary jurisdiction, the admiralty takes cognizance of mere questions of *meum* and *tuum* arising between individuals; its extraordinary or prize jurisdiction is vested in it for the purpose of revising the acts of the sovereign himself performed through the agency of his officers or subjects. A seizure on the high seas by an

unauthorized individual is a mere trespass, and produces no change of right, but such a seizure made by sovereign authority, vests the thing seized in the sovereign; for the fact of possession must have all the beneficial effects of the right of possession, as the justice or propriety of it cannot be inquired into by the courts of other nations. But as this principle might leave the unoffending individual a prey to the rapacity of cruisers, or a victim to the errors of those who even mean well, and as every civilized nation pretends to the character of justice and moderation, and to have an interest in preserving the peace of the world, they constitute courts with powers to inquire into the correctness of captures made under color of their own authority, and to give redress to those who have been unmeritedly attacked or injured. These are denominated prize courts, and the primary *object of their institution is to inquire whether a [*283] taking as prize is sanctioned by the authority of their sovereign, or the unauthorized act of an individual. From this it would seem to follow, that the decision of such a court is the only legal organ of communication through which the sanction of a sovereign can be ascertained, and that no other court is at liberty to deny the existence of sovereign authority, for a seizure which a prize court has declared to be the act of its sovereign.

The propriety of such an act may correctly become the subject of executive or diplomatic discussion; but the equality of nations forbids that the conduct of one sovereign, or the correctness of the principles upon which he acts, should be submitted to the jurisdiction of the courts of another. From these considerations I infer, that the capture and continued possession of The Sarah and her cargo, confirmed by the approbatory sentence of a court of the capturing power, vested a title in the claimant, which this court cannot, consistently with the law of nations, interpose its authority to defeat.

Having briefly stated the grounds upon which I originally formed and now adhere to, an opinion in favor of the claimants, I will consider the objections stated to the jurisdiction of the court, on the ground that the seizure was contrary to the law of nations.

It is admitted, if the court of St. Domingo had jurisdiction of the subject-matter, that the condemnation completed the devestiture of property. But it is contended that the subject, in this case, was not within their jurisdiction, because it was seized for a cause not sanctioned by the law of nations. I am unfortunate enough to think that neither the premises nor the conclusion of this argument are maintainable. The conclusion is subject to this very obvious objection, that it defeats the very end for which such courts were created.

To contend that a violation of the law of nations will take away

the jurisdiction of a court, which sits and judges according to the law of nations, appears to approach very near to a solecism. The occurrence which gives it jurisdiction takes it away.

[*284] *If the object and end of constituting a prize court be, to give redress against unlawful capture, and, as the books say, in such case to restore *velis levatis*, how can it make reparation to the injured individual, if it loses its jurisdiction; because there has been an injury done to him, the court can give him no redress. The argument admits, that a capture consistent with the law of nations, would give jurisdiction, but how is the legality or illegality of a capture to be determined, unless a court can take jurisdiction of the case. The legality of the capture is the very point to which a court is to direct its inquiries, and yet that inquiry is arrested, in its inception. The cause or circumstances of a capture can never be known to a court, without exercising jurisdiction on the subject. To maintain, therefore, that prize courts can only exercise jurisdiction over captures, made consistently with the law of nations, is in effect, to deprive them of all jurisdiction, since it leaves no means of deciding the question on which their jurisdiction rests.

But the premises which lead to this conclusion, will be found no less exceptionable than the conclusion itself; and the propriety of taking into consideration the questions which form those premises very questionable. The opinion of those of my brethren who maintain this doctrine, is founded upon two propositions.

1. That a nation cannot capture, on the high seas, a vessel which has within her territories, committed a breach of a municipal law.

2. That the condemnation in this case was grounded on an offence against a municipal law.

To me it appears wholly immaterial on what grounds the decision be founded, if the case be within their jurisdiction. Indeed, this is fully admitted by those of the court, who maintain the doctrine that I am considering; but under the idea of examining the jurisdiction of the court, they appear to me to go farther and examine into the correctness of its decision. I do not deny that there are circumstances material to the effect of sentences of foreign prize

[*285] courts, into which other courts may *inquire. The authorities quoted on this point relate exclusively to two, namely,

1. Whether the court is held in the territory of the sovereign who constitutes it.

2. Whether the subject *sub potestate* of the sovereign whose courts condemned it.

These circumstances have an immediate relation to the existence of the court, and of its power of acting upon the subject; but within

its legitimate scope of action, the correctness of its proceedings, or of the rules of decision by which it is governed, cannot, in the nature of things, and consistently with the idea of perfect equality and independence, be subjected to the review of other courts.

The decisions of such courts do not derive their effect from their abstract justice; they are in this respect analogous to the acts of sovereignty. They are universally conclusive, because nowhere subject to revision. Among nations they are considered as entitled to the same validity as the decisions of municipal courts, within their respective territories, and preclude the rights of parties, although contrary to every idea of law, reason, and evidence.

The court of St. Domingo being a court of coördinate authority with this, was equally competent to decide a question of jurisdiction arising under the law of nations. Had the question, whether a seizure under municipal law, upon the high seas, was contrary to the law of nations, or, if contrary to the law of nations, whether the court could not therefore exercise jurisdiction upon it, been brought to the notice of that court, it is presumed that their decree would not have been void, because they maintained the negative of the proposition. Had it been made a question before that court, whether the laws of France authorized the capture of The Sarah at ten leagues distance from the coast, or whether in fact the vessel was not seized within two leagues of the coast, it is presumed that their decision upon these points would have been conclusive, whatever may be the impression * of this court from the evidence now before us. [*286] It is impossible for this court to pretend to a knowledge of all the facts by which the decree of that court may have been regulated. The decree itself shows that the whole evidence is not before us; but if it were, that court is sole arbiter, both of the effect of testimony, and the credibility of witnesses. A similar observation may be made with regard to the laws of France which much pains has been taken to prove, did not authorize this capture. How can this court be supposed to know all the laws, sovereign orders or received principles which regulate the decisions of foreign courts. Such courts are best acquainted with the laws of their own government, and their decision upon the existence or effect of those laws must, in the nature of things, be conclusive in the eyes of other nations. Suppose that other courts were so far at liberty as to review the grounds upon which such decrees profess to proceed, the insufficiency of those grounds would not be conclusive against the correctness of such decisions, because they may be maintainable upon other grounds, not noticed, or even not known to the judge who pronounces them.

But if we are to look into the grounds upon which a decree is pro-

fessedly founded, extravagant as that upon the case of The Sarah is said to be, there is one view in which it may admit of justification. General Ferrand, in his preamble, declares it to be his leading object to remove the contrariety of opinion which existed among the officers of government relative to existing laws, respecting captures of vessels taken upon the coasts of St. Domingo. If their judges thought proper to consider this *arrete* as only declaratory of preëxisting laws, and that the words in the first article," "*ceux expedié pour les portes en leur possession en sortant avec ou sans chargement*," authorized the capture of vessels outward bound, I know no reason that we can have to declare it a misconstruction or incorrect opinion, or, if incorrect, to nullify their decree on that account. The conclusiveness of a foreign sentence appears to be at an end, the moment other courts undertake to look into the cause for which a capture was made. If the possession of the captor is the possession of his sovereign, and his courts have a right therefore to adjudicate
[* 287] property captured, *or carried into a foreign port, it appears to me to be immaterial on what ground the capture is made. The fact of dispossession by sovereign authority, judicially ascertained, deprives all other courts of the right to act upon the case.

Upon these considerations I have adopted the opinion that we are not at liberty to enter into the inquiry whether a capture of The Sarah was made in pursuance of belligerent or municipal rights. But if we are to enter into the inquiry, I am of opinion that the evidence before us plainly makes out a case of belligerent capture, and, though not so, that the capture may be justified, although for the breach of a municipal law.

In support of my latter position, both principle and the practice of Great Britain and our own government may be appealed to.

The ocean is the common jurisdiction of all sovereign powers; from which it does not result that their powers upon the ocean exist in a state of suspension or equipoise, but that every power is at liberty upon the ocean to exercise its sovereign right, provided it does no act inconsistent with that general equality of nations which exists upon the ocean. The seizure of a ship upon the high seas, after she has committed an act of forfeiture within a territory, is not inconsistent with the sovereign rights of the nation to which she belongs, because it is the law of reason, and the general understanding of nations, that the offending individual forfeits his claim to protection, and every nation is the legal avenger of its own wrongs. Within their jurisdictional limits the rights of sovereignty are exclusive; upon the ocean they are concurrent. Whatever the great principle of self-defence, in its reasonable and necessary exercise, will sanction

in an individual in a state of nature, nations may lawfully perform upon the ocean. This principle, as well as most others, may be carried to an unreasonable extent; it may be made the pretence instead of the real ground of aggression, and then it will become a just cause of war. I contend only for its reasonable exercise. The act of Great Britain, of the 24 Geo. III. c. 47, is predicated upon these principles. It subjects vessels to seizure, which approach [*288] with certain cargoes on board, within the distance of four leagues of her coast, because it would be difficult, if not impossible, to execute her trade laws, if they were suffered to approach nearer in the prosecution of an illicit design. But if they have been within that distance, they are afterwards subject to be seized on the high seas. They have then violated her laws, and have forfeited the protection of their sovereign. The laws of the United States upon the subject of trade, appear to have been framed in some measure after the model of the English statutes; and the 29th section of the act of 1799,[1] expressly authorizes the seizure of a vessel that has, within the jurisdiction of the United States, committed an act of forfeiture, wherever she may be met with by a revenue cutter, without limiting the distance from the coast. So also the act of 1807,[2] for prohibiting the importation of slaves, authorizes a seizure beyond our jurisdictional limits, if the vessel be found with slaves on board, hovering on the coast; a latitude of expression that can only be limited by circumstances, and the discretion of a court, and in case of fresh pursuit, would be actually without limitation. Indeed, after passing the jurisdictional limits of a state, a vessel is as much on the high seas as if in the middle of the ocean; and if France could authorize a seizure at the distance of two leagues, she could at the distance of twenty.

But the capture of The Sarah may fairly be considered as an exercise of belligerent right, and strictly analogous to seizure for breach of blockade. The right of one nation to exclude all others from trading with her territories, exists equally in war and in peace. Had the exclusion in this case been merely calculated for the interest of trade, it may have been considered as purely municipal. But there existed a war between the parent state and her colony. It was not only a fact of the most universal notoriety, but officially notified in the gazettes of the United States, by the proclamation of the French resident M. Pichon, who at the same time publishes the prohibition to trade with the revolters, with a declaration that seizure and confiscation should be the consequence of disobedience to this prohibition. Here,

[1] 1 Stats. at Large, 649.

[2] 2 Stats. at Large, 426.

then, was notice of the existence of war, and an assertion
[*289] *of the rights consequent upon it. The object of the measure was not the promotion of any particular branch of agriculture, manufacture, or commerce, but solely the reduction of an enemy. It was therefore not merely municipal, but belligerent in its nature and object. If France had a right to subdue the revolted colony, she had an undoubted right to preclude all nations from supplying them with the means of protracting the war. To confine her to her own jurisdictional limits, in the exercise of those acts of force which were necessary to carry into effect her right of excluding neutrals, would be a mere mockery, when by the very state of things she was herself shut out from those limits. Seizure on the high seas for a breach of the right of blockade, during the whole return voyage, is universally acquiesced in as a reasonable exercise of sovereign power. The principle of blockade has indeed in modern times been pushed to such an extravagant extent as to become a very justifiable cause of war, but still it is admitted to be consistent with the law of nations, when confined within the limits of reason and necessity. The right to subdue an enemy, carries with it the right to make use of the necessary means for that purpose, and the individual who does an act inconsistent with the rights of a belligerent, exposes himself to the liability to be treated as an enemy. The belligerent nation can exercise the same acts of violence against him that she can against an individual of her enemy. Nor can his sovereign protect an individual who has committed an aggression upon belligerent rights without becoming a party to the contest.

The argument drawn from the decree of Ferrand, to prove that France had not asserted her belligerent rights, is evidently founded upon a mistranslation. The sentence which authorizes the seizure of vessels when outward bound, after having entered the ports of St. Domingo, is substantive, and totally unaffected by the subsequent sentence, which authorizes a seizure of vessels sailing within two leagues of the coast. The former authorizes capture for the offence of having entered those ports; the latter, for being found in a situation from which an intention to commit that offence shall be inferred.

Nor, if the fact were so, that she had limited the right of
[*290] capture to two leagues from her coast, would *it follow that this was an exercise of municipal right; because a nation may restrict her subjects, in the exercise of belligerent rights, to a certain distance from the coast, or even to her jurisdictional limits, and yet the character of the seizure would be in no wise changed. If the object of the seizure is to promote the reduction of an enemy, it is an exercise of the rights of war.

From these considerations I conclude that the capture of The Sarah was justifiable upon principles not at all dependent upon municipal regulation; that it may fairly be considered as having been made in conformity with the law of nations, and, therefore, without acceding to the doctrine that a seizure contrary to the law of nations was a void seizure, and that we have a right to declare that a mere marine trespass which a court of France has declared to be the act of its sovereign, I conclude that the court of St. Domingo had jurisdiction in this case; and if it had jurisdiction, it is admitted that the property was altered, and the libellant ought not to recover.

Let it be observed that this is not an application on behalf of the vendee of the captor for the aid of this court to secure to him the benefit of his purchase. We find him in possession, and the application is for our aid to devest that possession, and restore it to the original owner. This owner was clearly an offender against the rights of France, and his only claim upon the interference of this court is, that he had escaped, with the property thus acquired, beyond two leagues from the shore of the nation that he had offended. In such a case it would be enough, for all the purposes of the defendant, if this court would imitate the state of our nation, and remain neutral between the parties.

Let it not be supposed that the opinion which I am giving devotes the commerce of our country to lawless depredation. My observations are applied to a case in which an evident aggression has been committed, by entering at least two of the interdicted ports of St. Domingo. The individual who will knowingly violate the rights of war, or laws of trade of another nation, is well apprised that he forfeits all claim to the protection of his country, or the interference of its courts. The peace of the nation, and the [*291] interests of the fair trader, imperiously require that the smuggler, or the violator of neutrality, should be left to his fate.

If I had no other reason to satisfy my mind of the correctness of the doctrines that I have been contending for, a conviction of their importance to the peace and security of the mercantile world would alone induce me to maintain them. The purchase of these goods was made in a Spanish port, under sanction of an agent of the French government, apparently countenanced by the government of the country in which he acted, and is sanctioned by a condemnation. If in the purchase of articles of merchandise in a foreign port, under the sanction of sovereign authority, it is nevertheless necessary, in order to acquire a good property, that a merchant should know whether they were captured by law, or without law, under the law of nations, or under municipal law, the office of a lawyer will be as necessary to

his education as the counting-house. Articles of commerce passing from hand to hand by mere delivery, often remaining for years in the same packages, distinguished by the same marks, may admit of identification after any length of time, in the remotest countries, and in the hands of the most innocent purchasers. But if a seizure by a sovereign, upon a ground which any court may adjudge unsanctioned by the law of nations, is tantamount to no seizure, and nothing done in pursuance of it can transfer a good property, where is the uncertainty to end? With regard to ships the inconvenience may not be so great. Every merchant knows that a vessel must be accompanied with her document papers, so that the purchaser may come to the knowledge of her having passed through a capture and condemnation, and be put on his guard against so precarious a title. He will know that he is liable to be dispossessed according to the varying construction of the law of nations that may prevail in different countries; yet he knows the full value of a property thus embarrassed. But in the purchase of merchandise he has no security, unless indeed he purchases them immediately from the manufacturer or the planter. It is a subject of curious speculation how far the pursuit or research after merchandise thus situated may be carried; whether the same
[*292] principle may not extend it into the *hands of the retailer or even the consumer. In one of the cases arising out of the capture of The Sarah, I mean that against Groning, the property is libelled in the hands of a purchaser without notice, after it was landed in this country. If we can go so far, I see not where we are to stop. Every subsequent purchaser, even the remotest, as far as the article will admit of identification, is in no better situation than the defendant Groning, and liable, upon the same principle, to be dispossessed. After going beyond the fact of seizure by sovereign authority within his own territory, (where he is supreme,) or upon the ocean, (where he is equal to all others,) unaffected by escape, recapture, or release, (by which property is restored to its state before seizure,) the approbatory sentence of his own court, (by which alone it can be judicially known to be the act of the sovereign,) beyond these limits every step that a court takes can only be productive of doubt, litigation, and uncertainty, and involve the commercial world in endless embarrassment, at the same time that it compromits the peace of nations, among whom it is a received and correct opinion, that a want of due deference to the jurisdiction of their maritime courts is a just cause of war.

4 C. 293; 6 C. 281; 3 W. 246; 5 P. 1; 3 H. 750; 6 H. 31; 7 H. 1; 8 H. 495; 13 H. 498; 14 H. 38; 17 H. 428.

*HUDSON and others *v.* GUESTIER, and LAFONT *v.* BIGELOW. [*293]

4 C. 293.

A seizure for the breach of a municipal regulation, made within the territorial jurisdiction of the sovereign, being valid, and conferring possession on the sovereign, his courts may proceed to sentence, though the *res* be lying in a port of another friendly power.

THESE cases were argued in connection with that of Rose *v.* Himely.

MARSHALL, C. J., delivered the opinion of the court, as follows:[1]

This case differs from that of Rose *v.* Himely in one material fact. The vessel and cargo which constitute the subject of controversy were seized within the territorial jurisdiction of the government of St. Domingo, and carried into a Spanish port. While lying in that port, proceedings were regularly instituted in the court for the island of Guadaloupe; the cargo was sold by a provisional order of that court, after which the vessel and cargo were condemned. The single question, therefore, which exists in this case is, did the court of the captor lose its jurisdiction over the captured vessel by its being carried into a Spanish port?

*The seizure was indisputably a valid seizure, and vested [*294] the lawful possession of the vessel in the sovereign of the captor. The right consequently existed in full force to apply immediately to the proper tribunals for an examination of, and decision on, the offence alleged to have been committed. The jurisdiction of those tribunals had attached, and this right to decide upon the offence was complete.

When a seizure is thus made for the violation of a municipal law, the mode of proceeding must be exclusively regulated by the sovereign power of the country, and no foreign court is at liberty to question the correctness of what is done, unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice. Recapture, escape, or a voluntary discharge of the captured vessel, would be such a circumstance, because the sovereign would be thereby deprived of the possession of the thing, and of his power over it. While this possession remains, the *res* may be either restored or sold, the sentence of the court can be ex-

[1] S. C. 6 C. 281, where the opinion of JOHNSON, J., in this case is adopted by the court.

ecuted, and therefore this possession seems to be the essential fact on which the jurisdiction of the court depends.

The laws of the United States require that a vessel which has been seized for violating them should be tried in the district where the offence is committed, and certainly it would be irregular and illegal for the tribunal of a different district to act upon the case. But of this irregularity, it is believed, no foreign court could take notice. The United States might enable the admiralty courts of one district to decide on captures made for offences committed in another district. It is an internal regulation to be expounded by our own courts, and of which the law of nations can take no notice. The possession of the thing would be in the sovereign power of the State, and it is competent to that power to give jurisdiction over it to any of its tribunals. There exists a full power over the subject, and an ability to execute the sentence of the court. The sovereign power possessing jurisdiction over the thing, must be presumed by foreign tribunals to have exercised that jurisdiction properly. But if the *res* be out of the power of the sovereign, he cannot act upon it, nor delegate authority to act upon it to his courts.

[*295] * If these principles be correct, it remains to inquire whether the brig Sea Flower remained in the possession and in the power of the sovereign of the captor after being carried into a Spanish port.

Had this been a prize of war, we have precedents and principles which would guide us. The cases cited from Robinson's Reports, and the regulations made by Louis XVI. in November, 1779, show that the practice of condemning prizes of war while lying in neutral ports has prevailed in England, and has been adopted in France. The objections to this practice may perhaps be sufficient to induce nations to change it by common consent, but until they change it the practice must be submitted to, and the sentence of condemnation passed under such circumstances will bind the property, unless the legislature of the country in which the captured vessel may be claimed, or the law of nations, shall otherwise direct.

The sovereign whose officer has in his name captured a vessel as prize of war, remains in possession of that vessel, and has full power over her, so long as she is in a situation in which that possession cannot be rightfully devested. The fact whether she is an enemy vessel or not, ought, however, to be judicially inquired into and decided, and therefore the property in a neutral, captured as an enemy, is never changed until sentence of condemnation has passed; and the practice of nations requires that the vessel shall be in a place of safety before such sentence can be rendered. In the port of a neutral she is

in a place of safety, and the possession of the captor cannot be lawfully devested, because the neutral sovereign, by himself or by his courts, can take no cognizance of the question of prize or no prize.

This position is not intended to apply to the case of a sovereign bound by particular treaties to one of the belligerents; it is intended to apply only to those neutrals who are free to act according to the general law of nations. In such case the neutral sovereign cannot wrest from the possession of the captor a prize of war brought into his ports.

A vessel captured as prize of war is, then, while lying in the port of a neutral, still in the possession of the sovereign of [*296] the captor, and that possession cannot be rightfully devested.

It is objected that his courts can take no jurisdiction of a vessel under such circumstances, because they cannot enforce a sentence of restitution.

But it is to be recollected that the possession of the captor is in principle the possession of his sovereign; he is commissioned to seize in the name of the sovereign, and is as much an officer appointed for that purpose, as one who in the body of a county serves a civil process. He is under the control and direction of the sovereign, and must be considered as ready to obey his commands legally communicated through his courts.

It is true that in point of fact cruisers are often commanded by men who do not feel a due respect for the laws, and who are not of sufficient responsibility to compensate the injuries their improper conduct may occasion; but in principle they must be considered as officers commissioned by their sovereign to make a seizure in the particular case, and to be ready to obey the legitimate mandate of the sovereign directing a restitution. The property, therefore, may be restored while lying in a neutral port, and whether it may, or may not be sold in the neutral port, the condemnation without a sale may change the property, if such condemnation be valid.

In cases of prize of war, then, the difficulty of executing the sentence does not seem to afford any conclusive argument against the jurisdiction of the court of the captor over a vessel in possession of the captor, but lying in a neutral or friendly port.

Do the same principles apply to a seizure made within the territory of a state for the violation of its municipal laws?

In the solution of this question the court can derive no aid from precedent. The case, perhaps, has only occurred in the wars which have been carried on since the year 1793, and the court in deciding it finds itself reduced to the necessity of reasoning from analogy.

[*297] * The seizure, it has been already observed, vests the possession in the sovereign of the captor, and subjects the vessel to the jurisdiction of his courts. The vessel, when carried into a foreign port, is still in his possession, and he is as capable of restoring it if the offence should not have been committed, as he is of restoring a neutral vessel unjustly captured as an enemy. The sentence in the one case may be executed with as much facility as in the other.

Possession of the *res* by the sovereign has been considered as giving the jurisdiction to his court; the particular mode of introducing the subject into the court, or, in other words, of instituting the particular process which is preliminary to the sentence, is properly of municipal regulation, uncontrolled by the law of nations, and, therefore, is not examinable by a foreign tribunal. It would seem, then, that the principles which have been stated as applicable in this respect to a prize of war, may be applied to a vessel rightfully seized for violating the municipal laws of a nation, if the sovereign of the captor possesses the same right to maintain his possession against the claim of the original owner in the latter as in the former case. If, on a libel filed by the original owner in the courts of the country into which the vessel might be brought, the possession could be defended by alleging that she was seized for the violation of a municipal law, and the right of the court to decide the cause would be thereby defeated, then that possession would seem to be sufficiently firm to maintain the jurisdiction of the courts of the captor.

Upon this point much doubt has been entertained. It is, however, the opinion of a majority of the judges, that a possession thus lawfully acquired, under the authority of a sovereign state, could not be devested by the tribunals of that country into whose ports the captured vessel was brought; at least that it could not be devested unless there should be such obvious delay in proceeding to a condemnation as would justify the opinion that no such measure was intended, and thus convert the seizure into a trespass.

The judgment of the circuit court is to be reversed.

[*298] *Chase and Livingston, justices, dissented from the opinion of the court in these cases, because the vessel, which was seized for the violation of a French *arrete*, or municipal regulation, was not brought into any port of France for trial, but was voluntarily carried by the captain of the privateer to St. Jago de Cuba, a Spanish port, and while lying there was, with her cargo, condemned as forfeited by a French tribunal sitting at Guadaloupe

JOHNSON, J. I concur in the reversal of the decision in the court below, but on different grounds from those which influence the opinion of my brethren. I had occasion in the case of The Sarah to express my ideas on most of the points arising in this case, and to that opinion I refer for the reasons of my present conclusion.

To me it appears immaterial whether the capture was made in exercise of municipal or belligerent rights, or whether within the jurisdictional limits of France, where she is supreme, or beyond those limits and upon the high seas, where her authority is concurrent with that of every other nation. We find the property in possession of the captor under authority derived from his sovereign, whose conduct cannot be submitted to our jurisdiction.

The modern practice of nations sanctions the condemnation of vessels lying in a foreign port, and that practice is not inconsistent with principle.

The plaintiff below has lost all remedy at law, and must look elsewhere for redress if he has sustained an injury.

4 C. 241; 6 C. 281; 18 H. 498.

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*ALEXANDER *v.* HARRIS, BAILIFF OF CRAMMOND. [*299]

4 C. 299.

A lease for one year, followed by an occupation for the three years, is not a lease for three years. *Rien, in arrear*, admits the demise laid in the avowry.

ERROR to the circuit court for the District of Columbia, in an action of replevin. The defendant avowed the taking for arrears of rent. The facts appear in the opinion of the court.

E. J. Lee, for the plaintiff.

Hiort and *Youngе*, for the defendant.

*MARSHALL, C. J., delivered the opinion of the court as [*301] follows, namely:

In this case two errors are alleged by the plaintiff in error.

1st. That the circuit court misdirected the jury.

*2d. That judgment for double damages ought not to [*302] have been rendered on the verdict.

1. The avowry, which sets forth the title under which the distress was made, states a lease for three years certain. The plea to this avowry was, "nothing in arrear," and on this plea issue was joined. At the trial of the cause, the avowant gave in evidence a lease for one year certain, and a subsequent possession for two years. On motion to instruct the jury that this lease did not support the avowry, the court said, that if the jury should be of opinion that the subsequent possession was under the original contract, and without any new agreement, then the avowant was entitled to recover, otherwise not. The jury found a verdict for the avowant.

The lease stated in the avowry is obviously a different lease from that which was given in evidence. A lease for three years is not a lease for one year. But it is contended that a subsequent possession, without any new express agreement, amounts to an extension of the original lease, and for this Bacon's Abridgment, and a dictum of Judge Buller, in the case of Birch *v.* Wright, 1 Term Rep. 378, have been cited. But those cases do not prove the point they were supposed to establish. In those cases, the original terms of the lease admit of the extension which was afterwards made by consent of parties. The lease was made for one year, and afterwards from year to year, as long as both parties should please. The principle of continuance is introduced into the original contract, and the occupation for three years is evidence that the circumstance had occurred, by force of which the contract should be a lease for three years. But in this case the original contract contains no principle of continuance. It is for a limited time, and can only be extended by a new contract, either expressed or implied. The lease, therefore, offered in evidence, does not support the avowry. But a question on which the court has felt more difficulty is this: Does the plea admit the demise, or is the avowant bound to prove it? If the plea admits the demise, then, notwithstanding the variance, the verdict is right, and
[*303] * the court has not erred in that part of the opinion which is against the party taking the exception.

The issue gives notice to the parties of the point which is to be tried, and which the testimony must support. That which is admitted by the pleadings need not be proved. If the plea in this case controverts the allegation in the avowry, that the tenant held under a lease for three years, reserving the rent stated to be reserved, then the avowant would be bound to prove the demise as laid. But if the plea admits the demise, then the avowant is not bound to prove it. The plea is, that the sum distrained for of the rent aforesaid, (that is, of the rent claimed under the lease stated in the avowry,) was not in arrear and unpaid, nor was any part thereof in arrear and

unpaid, at the time when the distress was made, as the avowant in his avowry hath alleged.

This plea avers the single proposition that the rent was not in arrear when the distress was made, and it is this averment alone that the party making the distress is to meet. The averment that the rent claimed in the avowry was not in arrear when the distress was made, admits the contract by which the rent might accrue, and only denies that any thing, at the time of the distress, remained due upon that contract. Upon principle, then, it would seem that the plea had dispensed with proof of the demise laid in the avowry, by admitting it.

No case has been found in which the point has been expressly decided. It is said in Buller's *Nisi Prius*, p. 59, "If the plaintiff plead *riens arrere* in bar to an avowry, he cannot, upon such issue, give in evidence non-tenure;" consequently, the defendant cannot be required to show the tenure; for if it was necessary to show it, the tenant would be at liberty to produce opposing testimony.

It is also laid down in Buller, p. 166, that in covenant for non-payment of rent, *riens in arrear*, or payment, at the day, is a good plea; but *riens in arrear* generally, *would not be a [* 304] good plea; and the reason appears to be, that *riens in arrear* generally admits the breach laid in the declaration, and that the rent was not paid on the day. This principle is decided in [1] King *v.* Saville, reported by Brownlow. Nothing in arrear on the day on which the rent is stated to have accrued, seems to be considered as equivalent to payment on the day; but nothing in arrear on a subsequent day admits that the covenant was broken, and, consequently, admits the covenant. It is not a good plea, because it admits the right of the plaintiff to recover damages. This furnishes a strong argument in favor of the opinion that nothing in arrear on the day when the distress was made, admits that the rent accrued as stated in the avowry.

The case of Warner *v.* Theobald, Cowper, 588, was an action of debt for rent, by an assignee against an assignee. The plea of *riens in arrear* was demurred to, and, consequently, the question to be decided by the court was, not what the plea admitted, but whether it was a bar to the action. Mr. Buller objected to this plea, because the plaintiff could not come prepared to know what it would be necessary to prove. The defendant might object to the assignment, or give in evidence payment before or after action brought.

In answer to Buller, Wood said, "The form of the plea is *nil debet*,

[1] *Qu.* Ware *v.* Savil, Brownlow, 19.

in the present tense. But in this case *riens in arrere* is a fairer plea than *nil debet;* because *nil debet* puts the whole declaration in issue, whereas this confines the question to the single fact whether such rent was due."

In giving his opinion in support of the plea, Lord Mansfield certainly had not in view the question now under consideration; for he uses expressions which would apply differently to that question. He says, "Saying nothing is due is the same as if he had said *nil debet;*" and immediately adds, "Besides, it is a more favorable plea for the plaintiff. He must then have applied the first assertion solely to the sufficiency of the plea as a bar, for it could not be a more favorable plea for the plaintiff, if it contested the whole declara-
[* 305] tion, * and admitted nothing, as is the case with *nil debet.*" He concludes with observing, "If the rent was due, and is not at the time of the plea, it could not have ceased to be due by the plaintiff's accepting it."

This case appears to the court to decide nothing further than that the plea pleaded was a good bar to the declaration in debt for rent, and to leave the question, how far it admits the demise laid in the avowry, open for consideration.

It is thought important in the inquiry, that the law appropriates a different plea, which controverts the demise, if the tenant means to contest it — the plea of *non demisit.*

The court is of opinion that the plea admits the demise; and that there is no error in the instruction given to the jury which is injurious to the party taking the exception.

In the judgment for double damages, there is no error. The law directs it positively.

Judgment affirmed, with costs.

[* 306] * CHAPPEDELAINE, Residuary Legatee, and CLOSRIVIERRE, Administrator *de bonis non*, of CHAPPEDELAINE, Complainants, *v.* DECHENAUX, Executor of DUMOUSSAY, Defendant.

4 C. 306.

If a bill seeks to open a settled account and surcharge and falsify it, the complainant must show clearly the errors complained of, otherwise the settlement remains a bar.

APPEAL from the circuit court of the United States for the district of Georgia, in a suit in equity. The material facts appear in the opinion of the court.

P. B. Key and *Harper*, for the defendant.

Winder, for the complainants.

*MARSHALL, C. J., delivered the opinion of the court, as [* 309] follows:

The bill in this case is brought to set aside a stated account which was signed by Dumoussay and Chappedelaine, in July, 1792, on the suggestion of fraud on the part of Dumoussay; or, if it be not set aside, to correct its errors, and to obtain a settlement of transactions subsequent to that account.

The stated account is pleaded in bar of so much of the bill as requires that the subject should again be opened, and the particular errors assigned, with the exception of one in the addition, are denied in the answer.

That the plea in bar must be sustained, except so far as it may be in the power of the representatives of Chappedelaine to show clearly that errors have been committed, is a proposition about which no member of the court has doubted for an instant. No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. But if palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent. The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist. Upon this principle, the report of the auditors in this case, and the exceptions to that report, *so far as respects [* 310] the stated account, are to be considered.

The first exception relates only to the manner in which the auditors understood the order referring the accounts to them, and need not be considered, since the sole inquiry will be, whether they have in fact made any deduction from the stated account which was not warranted by the interlocutory order, an order made on the principles which this court has already declared to be correct.

The second exception refers to the particular deductions made by the auditors. The first is, that the item in the stated account of 604*l.* 6*s.* 5*d.* is reduced to 333*l.* 0*s.* 8*d.*

The stated account between the parties, marked in the proceedings as the exhibit A, contains this item, and states it to be one fifth of the expenses for disbursements on the island of Sapelo, which was

the joint property of a company consisting of five, of which Dumoussay and Chappedelaine were partners. The items which composed this general account are all contained in exhibit F, stated by Dumoussay on the 3d of May, 1792, and assented to by Chappedelaine on the 23d of July, 1792, when the stated account was signed. The total of those disbursements is 4,224*l.* 3*s.* 8½*d.*, and the balance upon the account is 3,021*l.* 12*s.* 1½*d.*, the fifth of which is 604*l.* 6*s.* 5*d.*

In their explanatory report the auditors say that they took as the basis of this reduction an account settled by auditors in a suit decided in the circuit court of Georgia, which was instituted by Boisfeillet, one of the absent partners, against Dechenaux, who was executor both of Dumoussay and Chappedelaine. The auditors in that case were examined, and they depose that their corrections were made on the proof of double entries, false charges, omissions acknowledged by the executor of Dumoussay, and charges not proper to be made against Boisfeillet.

This testimony would of itself be sufficient to convince [* 311] the court that injustice was done in the settlement * of July, 1792, but would not show explicitly the amount of that injustice, and enable them to say what deductions from that settlement ought to be allowed, because, as was well observed by the counsel for Dechenaux, items might be properly chargeable to Chappedelaine, of which Boisfeillet ought not to bear a part.

The court, therefore, sought, in the documents connected with the report, for that more explicit information.

Upon looking into the exhibit F., there are, upon the face of the paper, obvious errors, which demonstrate the incorrectness of that statement, and the excessive inattention of Chappedelaine.

The first item on the debit side of this exhibit, is the sum of 3,571*l.* 3*s.* 8½*d.* disbursed for Sapelo. The funds for this disbursement were in part in the hands of Dumoussay, as the remnant of advances previously made by the partners. To this remnant he states himself to have added 2,368*l.* 12*s.* 0½*d.* from his private funds. On this advance made by himself in Georgia, he charges the company 15 per cent. amounting to 354*l.* on account of the difference of exchange between money in France and in Georgia, or, as he expresses it, for exchange, freight and insurance.

This charge has been rejected in the accounts of all the partners, for many obvious reasons. It is sufficient to observe, that as this money was advanced in Georgia by Dumoussay, and repaid to him in Georgia by the partners, there was as much reason for making these charges on the repayment, as on the original advance; and with respect to Chappedelaine, it is still more inadmissible, because he

had previously advanced his portion of this money to Dumoussay, and had allowed him 15 per cent. for these charges, in a deduction from that advance, so that this charge, with respect to Chappedelaine, is double.

The third item in this exhibit is a charge of 299*l.* as one year's interest on 2,368*l.* 12*s.* 0½*d.* This is more than double the real amount of interest.

*There is also in the credit side of the account, an error [*312] of 100*l.* in the addition. The errors apparent on the face of the exhibit F. amount to 611*l.*, and these errors are of such a description as strongly to characterize the stated account of July, 1792.

In the account stated by the auditors, there are omissions of moneys received by Dumoussay, and admitted to be chargeable to him in this account with the company, amounting to 189*l.* 10*s.* 10*d.*

The account containing these incontestable errors was submitted to auditors and still further reduced by them. Several of the small errors which they have detected are perceived, but the whole cannot be traced by this court, without engaging in the laborious task of auditors, which is incompatible with their duties. To that account the executor of Dumoussay, who was also the executor of Chappedelaine, was a party, and had a right, with respect to Boisfeillet, to rely upon the stated account of July, 1792, signed by Chappedelaine, because Chappedelaine was the attorney in fact of Boisfeillet, and because Boisfeillet had sanctioned that settlement, and had assumed the payment of his part. Yet in that case, the deductions from that account were made which the auditors in this case have taken as the basis of their settlement, and those deductions were made in consequence of double entries, false charges, and charges not admissible against Boisfeillet.

The great difficulty in admitting such an account, under such circumstances, consists in the uncertainty of the amount of those charges which were rejected as being inapplicable to Boisfeillet. This difficulty is removed, in a great measure, by inspecting the report in the present case. In that report, the auditors take up the items which were rejected on this principle, and charge them to Chappedelaine; so that, in truth, the alterations made in this item are all founded on errors which the auditors have corrected.

The second item of this exception is, that the auditors reduced the sum of 336*l.* 16*s.* 8*d.* admitted in the stated account, as being one fourth of the purchase and expense of Jekyll, to 311*l.* 9*s.* 6*d.* making a difference of 25*l.* 7*s.* 2*d.*

*This item in the exhibit A., which is the stated ac- [*313] count, is the result of the exhibit G., which is the account

of Jekyll, as settled between Dumoussay and Chappedelaine. There is an obvious error of 4*l.* 19*s.* 10*d.* in the division of 3*l.* 10*s.* in the hire of negroes, and the residue of the sum deducted is on account of the same charges on the moneys advanced for Jekyll, which were made on the moneys advanced for Sapelo, and which are rejected for the same reasons which were assigned for their rejection in that item of the account.

The auditors also reduced the sum of 990*l.* 3*s.* 1*d.* assumed by Chappedelaine for Boisfeillet, to the sum of 410*l.*, making a difference of 580*l.* 3*s.* 1*d.* Nothing can be more obvious than the propriety of this reduction. Dumoussay charges Chappedelaine with the debt of Boisfeillet, amounting, as he says, to 990*l.* 3*s.* 1*d.* which Chappedelaine assumes as the attorney of Boisfeillet. In a suit to which the executor of Dumoussay is a party, this debt appears to have been only 410*l.* No man can hesitate to admit that Chappedelaine must have credit with Dumoussay for the difference between the sum alleged to be due, and the sum actually due from Boisfeillet.

The auditors also struck out of the stated account the sum of 554*l.* 9*s.* 4*d.* assumed by Chappedelaine for one of the absent partners, that being considered by mistake as the share of that absent partner in the expenses of Sapelo. The sum actually due by that partner was afterwards paid by himself to the executor of Dumoussay. The court is satisfied, from the evidence, that this payment was made to Dechenaux as the executor of Dumoussay. The assumpsit of Chappedelaine was essentially as security for the absent partner, who still remained a debtor; and when the principal did himself pay what he owed to the original creditor, the assumpsit of Chappedelaine was of no further obligation. Although this was not an error in the account when settled, except so far as this charge exceeded the sum with which the absent partner was really chargeable, yet it becomes an item which can no longer be retained as
[*314] a charge against Chappedelaine, and in reforming *their accounts, it must be excluded from them.

There is also added to the credits of Chappedelaine the sum of 26*l.* 18*s.* which the auditors state to be the difference between the amount of a receipt given by Dumoussay and the sum actually debited to him in the accounts between the parties.

These several errors make up the sum of 1,457*l.* 8*s.* 4*d.* from which is to be deducted the sum of 667*l.* 10*s.* 1½*d.* admitted on the stated account to be due from Chappedelaine to Dumoussay. The balance standing to the credit of Chappedelaine would be, on the 30th of April 1792, 789*l.* 18*s.* 2½*d.*

The auditors state this balance at 1,346*l.* 10*s.* 7*d.* But from this

balance, reported by the auditors, is to be taken the sum of 305*l.* 13*s.* allowed by Chappelaine on the repayment in Georgia of money lent by him to Dumoussay in France. This sum has been disallowed by the auditors, but was allowed by the circuit court, and is allowed by this court. This would reduce the report of the auditors to 1,030*l.* 17*s.* 7*d.* exceeding the balance which is here supposed, by the sum of 240*l.* 19*s.* 4¾*d.*

The greatest part of this excess is produced by one third of merchandise sold and not entered in the account, and by a credit for continuing interest up to the 30th of April, 1792, on Chappedelaine's money in the hands of Dumoussay, which credits had been omitted in the stated account without any apparent reason, and must therefore have been among the numerous inaccuracies of that account. The residue of this excess is said by the auditors to be produced by numerous minute errors detected by a laborious investigation of all the accounts between the parties. This court cannot pursue them in that investigation. But in a case so replete with errors, which mark excessive negligence on the one side, and which can scarcely be ascribed to mistake on the other, the court is of opinion that the report of the auditors stating that these corrections were made on the inspection of the vouchers and entries which * were laid [*315] before them, ought to be received, unless the person taking the exception had himself required the testimony on any particular point to which he objected, to be submitted to the court, or had required a special statement from the auditors, exhibiting the reasons for their opinion on the particular point.

The balance due to Chappedelaine on the 30th of April, 1792, is so much of the loan made by him to Dumoussay, in France, which remains unpaid. By the contract between the parties, that loan was to carry an interest of six per cent. per annum until paid. The court, therefore, cannot consider it as a claim on an unsettled account, or as carrying interest at the rate established in Georgia. It is still governed by the law of the contract, and must carry interest at the rate of six per cent. per annum.

To the report, so far as it respects the accounts subsequent to the 30th of April, 1792, a general exception is taken, which is sufficiently repelled by the answer of the auditors. They say, if in the opinion of the defendant below, the auditors admitted any charge against Dumoussay, which was not sufficiently supported by testimony, he ought to have obtained a special statement from the auditors, or have made a special exception, which would bring the testimony on the particular point before the court. The only objection which the court can notice, is the allegation in the exception that the auditors have pro-

ceeded on accounts rendered by Dechenaux, without allowing him a credit which he claimed in those accounts. That credit is the balance appearing to be due to Dumoussay by the stated account of July, 1792. But that balance was entirely changed. The item was fully disproved by the testimony laid before the auditors. Dechenaux did not then withdraw his account, and require the plaintiff below to support his claims by other vouchers. It was clearly in the power of the plaintiff to have done this, for he might have forced Dechenaux to produce the entries and vouchers from which he had made out the account exhibited by himself. By leaving this account with the auditors without objection, he acquiesced in their considering as correct the items it admitted.

[*316] *This bill was brought to correct the stated account of July, 1792, and to settle the accounts between the parties subsequent to that period. The defendant exhibits the accounts subsequent to that period, but claims to set against them the balance due to his testator under the settlement of 1792. On those subsequent accounts, that balance has no influence. By introducing it into an account he was compellable to render, he cannot destroy the effect of that account. Had he intended to rely on this circumstance, he ought to have made the point before the auditors, and thus have enabled the plaintiff to take other measures to substantiate his claim. The auditors say, they "admitted the account presented by the defendant;" but this must be understood with the exception of the balance which he claimed under the settlement of July, 1792. It does not appear from their report, that the claims of the plaintiff below rested on that account so far as it went; but it is probable that further research was deemed unnecessary. The court cannot say that in this the auditors erred.

The decree of the circuit court is affirmed, so far as it accords with this opinion, and is reversed as to the residue.

6 C. 332; 8 W. 642; 12 P. 164; 2 H. 9; 16 H. 314; 17 H. 478.

The United States v. M'Dowell.

4 C. 316.

In deciding whether the matter in dispute be sufficient to sustain the jurisdiction of this court, it will look to the sum alleged by the obligee to be due upon the condition of the bond, and not to the penalty.

Error to the district court for the district of Kentucky, in an action of debt for $20,000, the penalty of an official bond given by the defendant, as marshal of that district, for the faithful execution of the duties

of his office by himself and his deputies. The defendant pleaded performance generally. The United States, in their replication, assigned a special breach of the condition of the bond, in not paying over to the United States the sum of $328. *The judgment [*317] below was against the United States, who sued out the present writ of error.

But this court, without argument, decided that it had no jurisdiction, the matter in dispute being of less value than $2,000.

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*THE MAYOR AND COMMONALTY OF ALEXANDRIA v. PATTEN and others.

4 C. 317.

If the debtor does not elect to make a particular application of a payment, at the time it is made, the creditor may, at any time afterwards, elect to what debt to apply it.

ERROR to the circuit court for the District of Columbia. The question concerned the application of a payment of money. The court below gave the following instruction:

*"If Mr. Patten, at the time of paying the money, did [*318] not direct to which account it should be applied, and if it was not understood by the parties at the time of payment, on which account it was made, the plaintiff had a right immediately to make the application to which account he pleased; but such application must have been recent, and before any alteration had taken place in the circumstances of Mr. Patten.

"If neither of the parties made the application as aforesaid, and if the parties did not then understand on which account it was made, then the payments ought in law to be applied to the discharge of the vendue account, the non-payment of which is alleged as the breach of the bond upon which the present suit is brought."

To this opinion the plaintiffs excepted, and, the verdict and judgment being against them, brought their writ of error.

Swann, for the plaintiffs.

Youngs, for the defendant.

*MARSHALL, C. J., after stating the case, delivered the [*320] opinion of the court, as follows:

It is a clear principle of law, that a person owing money on two several accounts, as upon bond and simple contract, may elect to apply his payments to which account he pleases; but if he fails to make the application, the election passes from him to the creditor. No prin-

ciple is recollected which obliges the creditor to make this election immediately. After having made it he is bound by it; but until he makes it he is free to credit either the bond or simple contract.

[*321] *Unquestionably, circumstances may occur, and perhaps did occur in this case, which would be equivalent to the declaration of his election on the part of the debtor, and, therefore, the court was correct in instructing the jury, that if they should be satisfied that the payments were understood to be made on account of the goods sold at vendue, they ought to apply them to the discharge of that account; but in declaring that the election, which they supposed to devolve on the plaintiff, if the application of the money was not understood at the time by the parties, was lost if not immediately exercised, that court erred.

Their judgment, therefore, must be reversed, and the cause remanded for a new trial.

Dawson's Lessee v. Godfrey.

4 C. 321.

A person born in England before the year 1775, and who always resided there, and never was in the United States, is an alien, and could not, in the year 1793, take lands in Mary land by descent from a citizen of the United States.

Error to the circuit court of the District of Columbia, sitting at Washington.

Russel Lee, a citizen of the United States, in the year 1793, died seized in fee of a tract of land called Argyle, Cowall, and Lorn, situated in that part of the District of Columbia which was ceded to the United States by the State of Maryland. Mrs. Dawson, the lessor of the plaintiff, would be entitled to the land by descent, unless prevented by the application of the principle of alienage. She was born in England before the year 1775, always remained a British subject, and was never in the United States.

The court below instructed the jury that she was an alien, and could not take the land by descent from Russel Lee, in the year 1793.

[*322] *Johnson, J.,[1] delivered the opinion of the court as follows:

This case rests upon the single question, whether a subject of Great Britain, born before the declaration of independence, can now inherit lands in this country? The general doctrine is admitted, that in the State of Maryland, in which the land lies, an alien cannot take by descent; but it is contended, upon the doctrine laid down in Cal-

[1] The Judges present were, Chase, Johnson, Livingston, and Todd.

vin's case, that the rights of the *antenati* of Great Britain formed an exception from the general rule. The point decided in the case of Calvin was, that a Scotsman, born after the union, could inherit lands in England. It is evident that this case is not directly in point, for the only objection here to the right of recovery did not exist in Calvin's case, as, whether in England or in Scotland, he was equally bound in allegiance to the king of Great Britain. It would be a contradiction in terms to contend that Dawson or his wife ever owed allegiance to a government which did not exist at their birth. It is upon a supposed analogy, therefore, and the reasoning of the judges in Calvin's case, that the argument for the plaintiff is founded. In the two cases of Coxe and M'Ilvaine and Lambert and Paine, in this court, this doctrine was very amply discussed, and this case is submitted upon those arguments. The counsel there contended, that the relation of the *postnati* of Scotland (after the union) to the subjects of Great Britain, was identically the same with the *antenati* of Great Britain (before our Revolution) to the citizens of this country, and that the community of allegiance at the time of birth, and not the existing state of it when the descent is cast, is the principle upon which the right to inherit depends.

The latter proposition presents the weak point of their argument, for the community of allegiance at the time of * birth [* 323] and at the time of descent both existed in Calvin's case.
And if the court in their argument expressed opinions which appear to go to the length contended for by the counsel, they must be considered as mere *obiter* opinions, since the decision of the cause did not depend upon them. We have no doubt that the correct doctrine of the English law is, that the right to inherit depends upon the existing state of allegiance at the time of the descent cast. And that the idea that it depends upon community of allegiance at the time of birth, is a consequence that follows from the doctrines that a man can never put off his allegiance, or be deprived of the benefits of it but for a crime. Community of allegiance once existing must, upon these principles, exist ever after. Hence it is that the *antenati* of America may continue to inherit in Great Britain, because we once owed allegiance to that crown. But the same reason does not extend to the *antenati* of Great Britain, because they never owed allegiance to our government. This idea will be best elucidated in the following manner. If an action be commenced in England by an *antenatus* of America for the recovery of land, the plea of alien born could not be maintained, because inconsistent with the fact; nor would a plea of the severance of these States avail the defendant, because the act of his government, independent of any crime of his own, does not deprive the plaintiff of his civil rights, although it may

release him from the obligation of allegiance. But if a suit of the same kind is instituted here by an *antenatus* of Great Britain, the plea of alien born could be maintained, for the plaintiff never owed allegiance to our government. To avoid it he would be put to a special replication, by which he must of necessity acknowledge the truth of the plea, and set forth circumstances which would amount to a recognition of his never having been a party in our social compact. Much of the difficulty in satisfying the mind on this subject vanishes upon a just view of the nature of the right of inheritance. Gentlemen have argued upon it as if it were a natural and perfect right; whereas it has its origin in, and is modified to, infinity by the laws of society, in exercise of the right of territorial jurisdiction. To be entitled to inherit in the State of Maryland, a right should be made out under the laws of that State. As the common law, [*324] which is the law of Maryland on this subject, *deprives an alien generally of the right of inheriting, it is incumbent upon the plaintiff to establish some exception in favor of his case. But I know of no exception, at common law, which gives the right to inherit distinctly from the obligation of allegiance, existing either in fact or in supposition of law. *Judgment affirmed.*

7 C. 603; 8 W. 464; 3 P. 99; 5 P. 304.

MOUNTZ and others *v.* HODGSON and THOMPSON.

4 C. 324.

THIS was a writ of error to the circuit court for the District of Columbia, founded on a refusal by that court to quash a *ca. sa.*, issued upon a judgment, certified into that court by two justices of the peace, under an act of assembly of Maryland.

F. S. Key, and *Marshall*, for the plaintiff.

Jones, for the defendant.

[*327] *MARSHALL, C. J. The majority of the court is of opinion that the writ of error must be quashed, this court not having jurisdiction.

*The refusal of the court below to quash the execution on motion, is by some of the judges supposed not to be a judgment [*328] to which a writ of error will lie. *Others are of opinion that a writ of error will lie to that decision of the court, but that this writ of error is not to the judgment of the circuit court, but to that of the justices. *Writ of error quashed.*

9 W. 576.

Blaine *v.* The Ship Charles Carter, and Donald and Burton and others, Claimants.

4 C. 328.

If the holder of a bottomry bond omits to enforce it, until the vessel has made another voyage, after the completion of the voyage mentioned in the bond, an execution levied on the vessel, before it has been arrested upon admiralty process to enforce the bond, displaces the bottomry lien.

An execution issued by a circuit court before the expiration of ten days after judgment, in a case open to a writ of error, is not void, and the marshal may justify under it; if voidable the remedy is to apply to the court to set it aside.

Appeal, from the circuit court of the United States for the district of Virginia, in a suit in admiralty. The nature of the case, and the facts upon which the court decided, appear in its opinion.

C. Lee, for the plaintiff.

P. B. Key, for the defendant.

* Chase, J.,[1] delivered the opinion of the court. [* 331]

The libel in this case was filed upon two instruments of writing purporting to be bottomry bonds, the one executed by the master in a foreign port, the other by the owner in a port of the State of Virginia, in which State the libel was filed.

The voyage of the former bond terminated in Virginia, and the vessel has since made two voyages. The latter instrument was on a voyage which terminated in London, and the vessel has since made a voyage to this country. Upon her return here, and before the warrant of the admiralty was served, the executions were levied upon her which form the groundwork of the claim interposed by Donald and Burton.

* The ship has been sold under the order of the court [* 332] below, and the question is, who has the preferable claim to the money now lying in the marshal's hands. On the validity of the bond of the master there can be no question. It is acknowledged by counsel to possess all the requisites of a good bottomry bond. But it was contended that it was satisfied by the freights, which it appears Blaine was in the receipt of; and if not satisfied, was fraudulently upheld to the prejudice of general creditors. In addition to the objections taken to the first bond, it is further contended against

[1] Marshall, C. J., having decided the case in the circuit court, did not give an opinion here. Cushing, J., was absent.

the second, that it wanted a sufficient bottomry consideration in part or in the whole. The court think it unnecessary to give a particular consideration to the several objections above stated. A satisfactory conclusion on the rights of the parties may be drawn from other principles, on the nature and effect of the contract of bottomry.

A bottomry bond made by the master vests no absolute indefeasible interest in the ship on which it is founded, but gives a claim upon her which may be enforced with all the expedition and efficiency of the admiralty process. This rule is expressly laid down in the books, and will be found consistent with the principle of the civil law, upon which the contract of bottomry is held to give a claim upon the ship. In the case of a bottomry bond executed by an owner in his own place of residence, the same reason does not exist for giving an implied admiralty claim upon the bottom, for it is in his power to execute an express transfer or mortgage. There is strong reason to contend that this claim or privilege shall be preferred to every other for the voyage on which the bottomry is founded, except seamen's wages. But it certainly can extend no further. Had the warrant of the admiralty been first served upon the ship, there might be some ground to contend that this court ought not to divest that possession in favor of executions served at a subsequent day, at least to the prejudice of the bond executed by the master. But as the executions in this case were levied before the service of the warrant, and so long after the bonds became due, the owners of the ship had lost that possession, upon which alone the warrant of the admiralty could operate, after losing the right of preference.

[* 333] * Some objections have been made to the validity of these executions, on the ground of their having issued previous to the day on which by law they ought to have issued. On this point the court will give no opinion. If irregular, the court from which they issued ought to have been moved to set them aside; they were not void, because the marshal could have justified under them, and if voidable, the proper means of destroying their efficacy have not been pursued.

The decree of the circuit court is affirmed, and the money ordered to be paid over to the execution creditors.[1]

10 P. 449; 6 H. 344.

[1] These executions were issued by a circuit court of the United States on the 7th of December, upon judgments recovered on the next preceding 30th of November, for upwards of $2,000.

The United States v. Gurney and others.

4 C. 333.

Where a bond was given to the United States, to pay a sum of money on a day certain, to their agent in Europe, payment after the day, and mere receipt of such payment without any new agreement, do not destroy the right to interest upon the money during the time the obligor was in default.

Nor does a special agreement, concerning damages, applicable to non-payment in Europe, affect the right to damages growing out of payment there, after the day.

Certificate of a division of opinion of the judges of the circuit court of the United States for the district of Pennsylvania, in an action of debt on a bond, conditioned to perform a certain agreement to pay moneys to the bankers of the United States, at Amsterdam. The terms of the agreement and bond, upon which the decision turned, and the state of the pleadings, are given in the opinion of the court.

Rodney, attorney-general, for the plaintiff.

E. Tilghman, and *Rawle*, for the defendant.

* Marshall, C. J., delivered the opinion of the court as [*341] follows, namely:

This case comes on upon a special demurrer to a replication filed by the plaintiffs, to a plea of payment after the day. The replication is double, and consequently ill. But it is a known rule that a demurrer brings all the pleadings before the court; in consequence of which, judgment must be rendered against him who has committed the first fault; or, which will most generally produce the same result, for him who, upon the whole record, shall appear to be entitled to their judgment. It therefore becomes necessary to examine the plea of the defendants. By their agreement with the secretary of the treasury, they were bound to pay to the bankers of the United States in Amsterdam the sum of 500,000 guilders in the following manner, namely, 230,000 guilders on or before the 1st day of February; 170,000 guilders on or before the 1st day of March; and the remaining 100,000 guilders on or before the 1st day of June, in the year 1803. The first payment was made on the day, and the last before the day, but the second payment was made on the 13th day of May, instead of the first day of March. On the effect of this payment, the whole case depends.

The defendants plead, that they did, on the 13th day of May, at Amsterdam, pay to the bankers of the United States, for the use of the United States, the sum of 170,000 guilders. The replication admits this payment as pleaded, but denies that it was accepted, received, and allowed by the United States in payment and satisfaction of the same sum which was payable on the 1st of March. The replication proceeds to aver, that the said sum of 170,000 guilders was not paid on the 1st day of March, nor had the defendants paid the damages of 20 per cent. which were stipulated, in case of failure to pay on the day.

The fact upon these pleadings appears to be, that the [*342] payment was received by the United States without *any stipulation respecting the effect of that receipt, upon their agreement with the defendants. If payment to the bankers of the United States, the persons to whom by agreement the money was to be paid, was not payment to the United States, it would not be a payment to the use of the United States, which the plea avers, and the replication in terms admits. In such case the replication, instead of averring that this sum was not accepted in satisfaction of the same sum payable at an earlier day, would have averred, and ought to have averred, that it was not accepted at all, and was not a payment to the use of the United States, in which case, instead of a special replication, issue might have been tendered on the plea. The court, then, understands the fact as stated in the pleadings to be, that the money was received without any agreement whatever, and the law must determine the effect of such a payment.

The payment made to the bankers in Amsterdam being, then, an actual payment to the United States, the inquiry is, whether it was such a payment, and is so pleaded, as to bar this action.

It is admitted that the statute of Anne, which allows payment after the day to be pleaded, is in force in Pennsylvania, but it is contended that this bond is not within that statute; or, if it is, that this plea is not good under it.

If this be a bond within the statute of Anne, on which the court gives no opinion, yet by that statute, the payment must be of the whole sum actually due, or the action for the penalty is not barred.

In this case the sum due on the 1st of March was paid on the 13th of May, without interest or damages.

By the United States it is contended, that damages at the rate of 20 per centum on the sum of 170,000 guilders were then due; by the defendants it is contended that no interest was due.

[*343] *The words of the contract to which each party refers, are not precisely the same in the condition of the bond and

in the articles of agreement which are referred to by the bond. There is no contradiction between them; but there is a variance in this, that the condition of the bond expresses more fully than the articles the idea of the parties, that in case of failure to perform the contract at Amsterdam, the demand for payment was to be made in Philadelphia. The words of the condition are, "or in case the said sums shall not be paid as aforesaid, then to repay to the United States the value of the said 500,000 guilders, at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of 20 per cent. in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment, and lawful interest for any delay of payment that may take place after the demand."

The defendants were merchants residing and carrying on trade in Philadelphia, in which place the contract was made, and by the law of the State, bills of exchange returned unpaid under protest are liable to 20 per cent. damages. It is sufficiently obvious, from these circumstances, and from the words of the condition, that the parties contemplated a repayment in Philadelphia in the event of non-payment in Amsterdam.

It is contended by the plaintiffs, that the instant the failure to pay the 170,000 guilders on the 1st of March had taken place, a full and complete right to the stipulated damages was vested in the United States, without any further act on their part; and that a payment of the principal sum on the succeeding day would not have relieved the defendants from those damages.

In this opinion the court does not concur with the counsel for the United States.

Contracts are always to be construed with a view to the real intention of the parties. In this contract, the object of the United States was to remit to their bankers in Amsterdam a sum of money, for which they had *occasion in Europe. The heavy [*344] damages to be incurred by the defendants in the event of their failing to make their stipulated payments in Amsterdam, were considered as a compensation for the disappointments produced by the non-payment of the money at that place, in such time as to answer the purposes of the contract. Whether payment at the same place on a subsequent day would answer these purposes, was for the United States to determine. They might accept it, or they might reject it, and claim whatever the law of their contract would give them. In the event of non-payment in Amsterdam at the time stipulated, the defendants are to repay to the United States the value of the guilders they shall have failed to pay in Amsterdam, "at the

rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of 20 per cent." The fair interpretation of this agreement is, that the demand is to be made in Philadelphia, that the money is to be repaid in Philadelphia, and that the damages are upon the money there to be repaid. Had a part of the sum of 170,000 guilders been paid on the 1st of March, it will scarcely be contended that damages would have accrued on that part. A repayment of it could not have been demandable in Philadelphia. It appears to the court that the acceptance of any part of the sum due in Amsterdam on a subsequent day, is a waiver of the claim to damages in Philadelphia, on the sum so accepted, for that sum cannot be demanded in Philadelphia.

This reasoning, to which the majority of the court would strongly incline, from the nature and circumstances of the contract, derives much additional force from the reference to bills of exchange. The repayment of the value of the guilders "at the rate of exchange current in Philadelphia at the time demand of payment is made, together with damages at the rate of 20 per cent." is to be made "in the same manner as if bills of exchange had been drawn for the said sum, and they had been returned protested for non-payment."

Why is this reference made to bills of exchange?

[*345] *The stipulation that damages at the rate of 20 per centum should be incurred on those sums which the defendants might fail to pay at the time and place mentioned in their contract, did not require it, unless the law of bills of exchange was either to explain or to give validity to that stipulation. To a majority of the court, it is satisfactory evidence that the parties intended this contract, if not as a complete substitute for bills of exchange, to operate between themselves as if bills had been drawn. The law of Pennsylvania, regulating bills of exchange, was well understood. If those drawn on any part of Europe are returned back unpaid with a legal protest, the drawers and indorsers are subjected to damages at the rate of 20 per centum. But the right to these damages is not complete until the bill be returned back under protest. Till then they are not demandable. Consequently, payment before the bill returns does away the right to demand them. By receiving payment, the holder waives his right to damages. The express reference to bills, which is made in this contract, and the terms in which that reference is made, being considered by the majority of the court as explanatory of the intention of the parties that the right to damages should be put on the same footing as if bills had been drawn, form an additional reason for their opinion that an acceptance in Amsterdam after the day, before a demand in

Philadelphia, amounts to a waiver of any right the United States might otherwise, perhaps, have had to demand the stipulated damages.

But whether the sum agreed to be paid as a compensation for a failure to pay at the time and place mentioned in the contract, be considered merely as a penalty, or as stipulated damages, of which the law will coerce the payment, a forfeiture took place on the non-performance of the condition of the bond, and a right to something more than that condition vested immediately in the obligees. If the reservation of damages in the condition of the bond is in law only a double penalty, then interest is the legal compensation for this breach of the covenant contained in the condition of the bond. If it be even of the character given to it by both parties in argument, the amount of damages settled by the parties themselves, the majority of the court is *not satisfied, that in waiving those damages the obligee [*346] has, without any agreement on the subject, relinquished that right to interest which is attached to all contracts for the payment of money, which is only displaced by the agreement to receive a larger sum in damages, and which a mere tacit implied waiver of those stipulated damages might reinstate. The majority of the court, therefore, is of opinion, that under the circumstances which have taken place, the United States ought to receive, under this contract, interest on the sum of 170,000 guilders, from the first of March, the day on which that sum ought to have been paid, until the thirteenth of May, the day on which it was actually paid. Judgment, therefore, on the pleadings, must be rendered for the plaintiffs.

By the 26th section of the Judicial Act,[1] it is directed, that in cases of this description the court shall render "judgment for so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, the same shall, if either of the parties request it, be assessed by a jury."

In this case it is the opinion of the majority of the court, that judgment ought to be rendered for so much as remains due of the sum of 170,000 guilders, calculating interest thereon from the 1st of March in the year 1803, and if either of the parties request it, that a jury be empannelled to ascertain the value of this sum in the money of the United States.

11 P. 420.

[1] 1 Stats. at Large, 87.

[*347] * PEISCH and others *v.* WARE and others, and THE UNITED STATES *v.* THE CARGO OF THE SHIP FAVOURITE.

4 C. 347.

Under the Collection Act of March 3, 1799, s. 43, (1 Stats. at Large, 660,) goods landed from a derelict vessel, in order to save them, are not forfeited by being found without the custom-house marks.

The 51st section of the same act applies only to removals by the owner, or with his consent, or connivance. Under the 52d section the misconduct of mere strangers does not work a forfeiture.

It is a general principle that a law of forfeiture can be applied only to those cases, in which the means prescribed for the prevention of a forfeiture can be employed.

Fifty per centum of the gross value of goods saved from a derelict vessel in Delaware Bay allowed for salvage.

APPEALS from the circuit court of the United States for the district of Delaware. In the case first named the only question was as to the amount to be allowed for salvage; the other involved a forfeiture of the goods. The facts are stated in the opinion of the court.

Rodney, Attorney-General, and *Reid*, for the United States.

Brown and *Vandyke*, contrà.

[*358] * MARSHALL, C. J., delivered the opinion of the court, as follows:

In these cases two questions are to be decided by the court.

1st. Is the cargo of The Favourite, or any part of it, forfeited to the United States?

2d. Are Ware and others entitled to any, and if to any, to what salvage.

The first count in the first libel filed on the part of the United States claims the brandies, wines, and cordials therein mentioned, in consequence of their being found in the possession of certain

[*359] persons therein named, unaccompanied * with such marks and certificates as are required by law, the duties thereon not having been paid, or secured to be paid.

The second count claims them as forfeited because they were removed, without the consent of the collector, before the quantity and quality of the said wines and spirits, and the duties thereon, were ascertained according to law; the duties thereon not having been paid or secured.

The third count claims them because they were found concealed, the duties not having been paid or secured according to law.

The second libel claims certain other goods, which were parcel of the cargo of The Favourite, as forfeited, by being found unlawfully concealed, the duties thereon not having been paid or secured.

The facts of the case are these: The ship Favourite, belonging to Mr. Peisch, of Philadelphia, was discovered about the last of October, adrift in the bay of Delaware, with her masts gone by the board, and without anchors, cables, or rudder, and in danger of being carried out to sea. A company was formed to save the vessel and cargo; and with considerable labor, in the course of several days, the cargo was unladen and landed at Lewis, a small town on the bay, not a port of delivery, where it was, with the approbation of the collector, left under the care and in the custody of a revenue officer residing at that place, who was one of the party that had originally taken possession of the vessel, and under whose direction the whole business had been in a great measure conducted. On the 3d of November, while the salvors were unlading the vessel and landing the cargo, an imperfect entry was made by the owners or consignees, after which an award was made between the owners and salvors, by which the salvors were allowed one half the cargo. The owners were dissatisfied with this award, and refused to acquiesce under it. The collector ordered the goods, which had been in the custody of a revenue officer, to be carried to Wilmington for the purpose of ascertaining *the amount of duties. The salvors objected to [*360] this, and requested that the duties might be ascertained at Lewis, offering at the same time to pay the duties on the moiety of the cargo claimed by them under the award. The collector persisting in his determination to remove the goods to Wilmington, the salvors sued out a writ of replevin from the state court, and by force of that writ took the goods out of the possession of the revenue officer. This act is the foundation of the forfeiture alleged in the libels.

The forfeiture, said to be occasioned by the goods being found without the marks and certificates required by law, depends upon the 43d section of the act for collecting duties, and on other sections of the same act, which are explanatory of the 43d section. The particular clause giving the forfeiture is in these words: "And if any casks, chests, vessels, or cases, containing distilled spirits, wines, or teas, which by the foregoing provisions ought to be marked and accompanied with certificates, shall be found in possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence that the same are liable to forfeiture." The law then authorizes a seizure, and subjects such distilled spirits, &c., to forfeit-

ure, unless it be proved at the trial that they were imported according to law, and that the duties were paid or secured.

The objects of this clause are those vessels only which, "by the foregoing provisions," ought to be marked and accompanied with certificates. To determine its extent, the "foregoing provisions" must be looked into.

This subject is first taken up in the 37th section[1] of the act. That section directs particular and additional entries to be made of distilled spirits, wines, and teas, which provisions are adapted to regular importation, not to those articles when saved from a wreck.

The entry is to be made by the importer or consignee, and specifications are required which can only be given by the owner or consignee, when in possession of the papers relative to the
[*361] vessel and cargo. If a vessel be *wrecked on the coast, the cargo must be lost, or brought on shore without the knowledge of the owner or consignee, so as to put it in his power to make the entry, and the salvors are not only not the persons designated by the law to make, but they will often not possess the information which would enable them to make it.

The act proceeds to require that this entry shall be transmitted to the surveyor of the port where the delivery of the cargo is to commence, to whom also every permit for unlading or landing any part of the cargo must be previously produced, who shall record the same, and indorse thereon the word "inspected," the time when, and his one name. Goods landed previous to these formalities are to be forfeited.

These regulations obviously respect a regular importation, where all these prerequisites to landing may be performed; not cases where a landing must take place without them. To suppose them applicable to salvage goods, would be to suppose that the legislature designed to prohibit salvage entirely, or to forfeit the cargoes of all vessels which might be wrecked on the coast.

The 38th section[2] requires that all distilled spirits, wines, and teas, shall be landed under the inspection of the surveyor, or other officer acting as inspector of the revenue for the port, and, therefore, can relate only to cases of regular importation at the port of delivery, where the revenue officer may superintend the landing. He is directed to attend at all reasonable times, not at all places.

The 39th section[3] prescribes the duty of the officer of inspection of the port where the spirits, &c., may be landed. He is to ascertain the duties, and mark the casks.

[1] 1 Stats. at Large, 658. [2] Ib. [3] Ib. 659.

The 40th section[1] directs the surveyor, or chief officer of inspection of the port or district in which the said spirits, wines or teas, shall be landed, to give the proprietor, importer, or consignee, a general certificate; and the 41st section[2] directs him to give a particular certificate * for each vessel; which certificate passes with the [* 362] vessel to the purchaser.

These sections are connected with those which precede them, and relate to regular importations, where the spirits, &c., are landed under a permit at a port of delivery, and there is a proprietor, importer, or consignee, or an agent to whom the certificates may be granted; not to spirits, &c., which may, from the nature of things, lawfully get into the possession of individuals without the knowledge of a revenue officer.

The 42d section[3] only directs that blank certificates shall be provided.

These are the sections which precede that which is supposed to give the forfeiture claimed under this count of the libel.

The first part of the 43d section directs the proprietor, importer, or consignee, who may receive the said certificates, to deliver them with the vessels to the purchaser; and then comes the clause which subjects to forfeiture all vessels containing spirits, &c., which may be found unmarked and not accompanied by certificates, which by the foregoing provisions ought to be marked and accompanied by certificates.

In the foregoing provisions the legislature, in the opinion of this court, did not intend to comprehend wrecked goods, or goods found under circumstances like those in The Favourite, where the vessel was deserted by her crew, and where it might be necessary, for the preservation of the goods, to take them to the nearest accessible part of the coast. Either these spirits and wines would have been liable to forfeiture if brought to land under the most pressing circumstances, where inevitable loss must attend any delay, if a revenue officer should not be present to take possession of them, or the single circumstance of their being found unmarked and unaccompanied with certificates, is not in itself sufficient to forfeit them. The opinion of the court that it was not the intention of the legislature to subject goods, under such circumstances, to forfeiture, is not formed exclusively * on the extreme severity of such a regulation. [* 363] It is formed also on what is deemed a fair construction of the language of the several sections of the law, which seems not adapted to cases like the present.

The second count in the libel claims the goods as forfeited, because

[1] 1 Stats. at Large, 659. [2] Ib. [3] Ib. 660.

they were, without the consent of the proper officer, removed from the place where they were deposited, before the amount of duties was ascertained, the duties at that time not being paid or secured.

Neither this count, nor the first, supposes any forfeiture to have been incurred by the landing of the goods, or the unlading of the vessel. The spirits and wines are presumed to have been legally brought on shore, and it is the removal only which gives title to the United States. The court, therefore, is to inquire, whether these goods were under such circumstances that a removal, such as has taken place in this case, will produce a forfeiture. This depends on the 51st section of the law, in expounding which it becomes proper to notice the 50th also. This section prohibits the unlading of any vessel, or the landing of any goods, without a permit granted by the proper officers, and subjects the master or other person having the command of such vessel, and all those who shall be concerned in unlading, removing, or storing such goods, to heavy penalties, and the goods themselves to forfeiture.

It was well observed that the application of this section to cases where the goods must perish, if not immediately brought on shore, and to cases in which a permit cannot regularly be granted, would be not only to prohibit, but to punish every attempt to save a cargo about to be lost on the coast. This construction of the law could only be made where the words would admit of no other. But it is unquestionably a correct legal principle, that a forfeiture can only be applied to those cases in which the means that are prescribed for the prevention of a forfeiture may be employed. The means prescribed to save the forfeiture given in the 50th section cannot be employed where a vessel is deserted by her crew, or cannot be brought into port. The permit cannot be obtained, nor can those steps [*364] which must precede the attainment * of a permit be taken. Upon just legal construction, then, the landing of these goods without a permit did not subject them to the forfeiture of the 50th section. This act is not within the law. The 50th section is calculated for cases in which the general requisites of the law can be complied with, not for salvage goods, in cases where those general requisites cannot be complied with.

The 51st section relates to the removal of goods from the wharf or place on which they may have been landed in conformity with the directions of the 50th section. It presupposes a permit, and that they were landed under the inspection of a revenue officer, in the manner prescribed by the 38th section.

It presupposes a case in which the guaging and marking may be done, and the other means prescribed for the ascertainment of the

duties and security of the revenue may be taken, at the place of landing; not a case in which a landing must be made without a permit, often in the absence of a revenue officer, and where the goods could not be permitted, without extreme peril, to remain at the place of landing until these measures should be taken.

The court is also of opinion that the removal for which the act punishes the owner with a forfeiture of the goods must be made with his consent or connivance, or with that of some person employed or trusted by him.

If, by private theft, or open robbery, without any fault on his part, his property should be invaded, while in the custody of the officer of the revenue, the law cannot be understood to punish him with the forfeiture of that property. In the 52d section, therefore, to which the revenue officers seem to have intended to conform, so far as the case would admit, which directs them in the case of an incomplete entry to store the goods at the risk and expense of the owner or consignee, no forfeiture is annexed to their removal, unless the penalties of the 51st section, or of the 43d section, be applied to the 52d.

The court is of opinion that those penalties cannot be so applied in this case, not only because, from the whole * tenor [*365] of the law, its provisions appear not to be adapted to goods saved from a vessel under the circumstances in which The Favourite was found, but, because, also, the law is not understood to forfeit the property of owners or consignees, on account of the misconduct of mere strangers, over whom such owners or consignees could have no control.

It has been urged on the part of the United States, that although the property of the owner should not be forfeited, yet that moiety which is claimed by the salvors has justly incurred the penalties of the law. But if the award rendered in this case be not binding, the salvors could have only a general claim for salvage, such as a court might allow; and if it be binding, still they acquired no title to any specific property. Their claim was in the nature of a general lien, and any irregular proceeding on their part would rather furnish motives for diminishing their salvage, if that be not absolutely fixed by the award, than ground of forfeiture. The irregularity, too, if any, which has been committed by them, being merely an attempt to assert, in a couse of law, a title they supposed themselves to possess, and with no view to defraud the revenue, this court would not be inclined to put a strained construction on the act of congress, in order to create a forfeiture.

The third count in the first libel, and the second libel, claim a forfeiture on the allegation that the goods were concealed. The fact

does not support this allegation. There was no concealment in the case.

Taking all the circumstances into consideration, it is the unanimous opinion of the court, that no forfeiture has been incurred, and that the libels filed on the part of the United States were properly dismissed.

The next question to be considered is, to what amount of salvage are the salvors entitled? That their claim is good for something, is the opinion of all the judges; but on the amount to be allowed the same unanimity does not prevail.

[*366] *For the *quantum* of salvage to be allowed, no positive rules are fixed. It depends on the merit of salvors, in estimating which, a variety of considerations have their influence.

In the case before the court, the opinion of the majority is, that the sentence of the circuit court ought to be affirmed. This opinion, however, is made up on different grounds. Two of the judges are of opinion that the award was fairly entered into, and although both parties might be mistaken with respect to the obligation created by the law of Delaware, yet there is no reason to suppose any imposition on either part; nor is there any other ground on which the award can be impeached or set aside. Two other judges, who do not think the award obligatory, view it as the opinion of fair and intelligent men, on the spot, of the real merit of the salvors, and connecting it with the testimony in the cause, are in favor of the salvage which has been awarded, and which has been allowed by the sentences of the district and circuit courts. Three judges are of opinion that the award is of no validity, and ought to have no influence. They think the conduct of the salvors, in taking the goods out of the possession of the revenue officer, though by legal process, is improper, and that the salvage allowed is too great.

They acquiesce, however, cheerfully in the opinion of the majority of the court, and express their dissent from that opinion, solely for the purpose of preventing this sentence from having more than its due influence on future cases of salvage.

The sentence of the circuit court is affirmed, without costs.

15 H. 40.

*Shearman v. Irvine's Lessee. [*367]

4 C. 367.

The act of limitations of the State of Georgia, (1767,) does not require an entry within seven years after the title accrued, unless there is an adverse possession.

Error to the circuit court of the United States for the district of Georgia, in an action of ejectment. The question was, whether the act of limitations of that State required an entry to be made on lands within seven years after the title of the plaintiff accrued. There was no adverse possession prior to the ouster, laid in the declaration, just before the suit was brought.

No counsel appeared for the plaintiff, and *P. B. Key*, for the defendant, prayed an affirmance.

*Marshall, C. J. The error alleged is founded on a [*369] construction of the act of Georgia, which this court thinks is totally inadmissible. How such an opinion could have been entertained is unaccountable. There is no foundation for it.

Judgment affirmed, with costs.

*Morgan v. Callender. [*370]

4 C. 370.

Appeal from the district court of the United States for the territory of Orleans, in a suit in equity.

That court was established by the act of congress, of 26th of March, 1804, (2 Stats. at Large, 285, s. 8,) and had a jurisdiction similar to that given to the district court of the United States for the district of Kentucky.

This court was of opinion that an appeal lies from that court to this; but that in this case, the court below had not jurisdiction, because it did not appear that the parties were citizens of different States, nor aliens, &c., so as to give them a right to litigate in the courts of the United States.

Alexander v. The Baltimore Insurance Company.

4 C. 370.

The seizure of the cargo, the vessel being at liberty to proceed, does not justify an abandonment of the vessel.

Total loss of the cargo during the voyage, does not constitute a technical total loss of the vessel.

Error to the circuit court of the United States for the district of Maryland.

The Chief Justice, in delivering the opinion of the court, stated the material facts, found by the special verdict, to be as follows, namely:

This action was brought against the underwriters, to recover the amount of a policy insuring the ship John and Henry, from Charleston to Port Republican, or one other port in the Bite of Leogane. On the 2d of October, 1803, The John and Henry, while prosecuting her voyage, was seized by a French privateer, and carried into the port of Mole St. Nicholas, where the cargo [*371] *was taken by M. de Noailles, the French commandant, for the use of the garrison. On the same day the master of the vessel received a written engagement from M. de Noailles to pay for the cargo in coffee, after which the vessel was unladen. The captain remained at the Mole in expectation of receiving payment, until the 29th of October, when he sailed in The John and Henry for Cape François, with an order on that place for payment in coffee. On the 4th of November she was seized by a British squadron then blockading Cape François, and condemned as prize. Cape François is not in the route to Port Republican, nor to any port in the Bite of Leogane; nor in the route to return from Mole St. Nicholas to the United States. The abandonment was made in December, on account of the capture by the French privateer. The declaration claims the amount of the policy in consequence of that capture. The judgment of the court below was for the defendant.

The only question decided by this court was, whether the plaintiff had a right to abandon and recover as for a total loss.

Harper, for the plaintiff.

Martin, for the defendant.

*MARSHALL, C. J., after stating the facts of the case, de- [*373] livered the opinion of the court, as follows, namely:

It has been decided in this court, that during the existence of such a detention as amounts to a technical total loss, the assured may abandon; but it has also been decided that the state of the fact must concur with the state of information to make this abandonment effectual. The technical total loss, therefore, occasioned by the capture and detention at Mole St. Nicholas, must have existed in point of fact in December, when this abandonment was tendered, or the plaintiff cannot succeed in this action.

Previous to that time the vessel had been restored to the captain; all actual restraint had been taken off; and it does not appear that her ability to prosecute her voyage was in any degree impaired. But her cargo had been taken by Monsieur de Noailles, the commandant at Mole St. Nicholas, and had not been paid for. The restoration of the vessel, without the cargo, is said not to terminate the technical total loss of the vessel.

The policy is upon the vessel alone, and contains no allusion to the cargo. Had she sailed in ballast, that circumstance would not have affected the policy. The *underwriters [*374] insure against the loss or any damage to the vessel, not against the loss or any damage to the cargo. They insure her ability to perform her voyage, not that she shall perform it.

If, in such a case, a partial damage had been sustained by the cargo, no person would have considered the underwriters as liable for that partial damage; why, then, are they responsible for the total destruction of the cargo? It is said that by taking out the cargo the voyage is broken up. But the voyage of the vessel is not broken up; nor is the mercantile adventure destroyed from any default in the vessel. By this construction the underwriter of the vessel, who undertakes for the vessel only, is connected with the cargo, and made to undertake that the cargo shall reach the port of destination in a condition to answer the purposes of the assured. Yet of the cargo he knows nothing, nor does he make any inquiry respecting it.

If it be true that the technical total loss was not terminated until the cargo was paid for, because the voyage was broken up, then the underwriters would have been compellable to pay the amount of the policy, although the vessel had returned in safety to the United States. To prosecute the voyage, it is said, had become useless, and, therefore, the engagement of the underwriters was forfeited, although this state of things was not produced by any fault of the vessel. If this be true, it would not be less true if, instead of proceeding to Cape François, The Henry and John had returned from Mole St.

Nicholas to the port of Charleston. The contract, then, instead of being an insurance on the ability of the ship to perform her voyage, an insurance against the loss of the ship upon the voyage, would be a contract to purchase the vessel at the sum mentioned in the policy, if circumstances, not produced by any fault or disability in the vessel, should induce the captain or the assured to discontinue the voyage after it had been undertaken.

This is termed pushing a principle to an absurdity, and, therefore, no test of the truth of the principle. But if it be a case which would occur as frequently as that which has occurred, and [* 375] if the result which has been *stated flows inevitably from the principle insisted on, the case supposed merely presents that principle in its true point of view, deprived of the advantages it derives from its being adapted to the particular and single case under argument. Either the technical total loss of the ship did or did not terminate when she was restored to the master uninjured, and as capable of prosecuting her voyage as when she sailed from the port of Charleston. If it was then terminated, this action cannot be sustained. If it was not then terminated, on what circumstance did its continuance depend? At one time it is said to depend on the ability or inability of the owner to employ her to advantage. But this position requires a very slight examination to be discarded entirely. So far as respected the vessel herself, and her crew, she was as capable of being employed to advantage as she had ever been. Only the funds were wanted to enable her to purchase a return cargo on the spot, or to proceed to her port of destination, and there purchase one. Or she might have returned immediately to the United States, and if any direct loss to the vessel was sustained, by being turned out of her way, that, after restoration, would be a partial, not a total loss. Besides, what dictum in the books will authorize this position? And what rule is afforded to ascertain the degree of inconvenience which, when in point of fact the vessel is in safety, in full possession of the master, and capable of prosecuting her voyage, shall warrant an abandonment?

No total loss of the vessel, then, existed after her restoration, so far as that total loss depended on the incapacity of the owner to employ his vessel to advantage. If the total loss continued after the restoration, that continuance was produced singly by the non-payment for the cargo, which is said to have broken up the voyage. If, then, the vessel had returned to a port in the United States, the voyage would still have been broken up, and the right to abandon would have been the same as it was while she was on the ocean, in full possession of her captain.

*But it is apparent that the captain had terminated the [* 376] voyage on which the vessel was insured. Had his contract with De Noailles been complied with at Mole St. Nicholas, or at Cape François, he would not have proceeded to the Bite of Leogane. Had it not been complied with, he would have had no more inducement to go to a port in the Bite of Leogane from Cape François, than from Mole St. Nicholas. The voyage to Port Republican, then, which was the voyage insured, was completely terminated at Mole St. Nicholas; the voyage to Cape François, in making which she was captured, was a new voyage, undertaken, not for the benefit of the underwriters of the vessel, but for the benefit of the owners and underwriters of the cargo. Consequently, so far as respects the underwriters of the vessel, who insured only the voyage to the Bite of Leogane, the capture at Cape François is an immaterial circumstance, and the technical total loss produced by carrying the vessel into Mole St. Nicholas, was either terminated when she was restored without her cargo, or would have continued had she returned to an American port without her cargo.

Upon principle, then, independent of authority, it is very clear that the underwriter of the vessel does not undertake for the cargo, but engages only for the ability of the vessel to perform her voyage, and to bear any damage which the vessel may sustain in making that voyage.

But it is contended that adjudged cases have settled this question otherwise.

The case has frequently occurred, and a direct decision might be expected on it, if a construction so foreign from the contract had really been made. It often happens that the cargo of a neutral vessel is condemned as enemy property, and the vessel itself is discharged. Not an instance is recollected in which the right to abandon in such a case, after the vessel was restored, has been claimed. Yet, if the loss of the cargo amounted to a destruction of the voyage, so far as respected the vessel, and thereby created a total loss of the vessel *herself, notwithstanding her restoration to the [* 377] captain uninjured, and in a full capacity to prosecute her voyage, such claims would be frequently asserted, and vessels would be valued high in the policy, for the purpose of selling them on a contingency which so often occurs. It would be strange, indeed, to admit, that if this cargo had been condemned in Mole St. Nicholas, and the vessel had been liberated, the right to abandon would not have been produced by the loss of the cargo, and yet to contend that non-payment for the cargo does produce that right.

In recurring to precedent, no direct decision by a court on the point,

no direct affirmance of the principle has been adduced; but the counsel for the plaintiff relies on general *dicta* in the books which are used in reference to other principles. Thus in 1 Term Rep. 191, Judge Buller says, "It is an assurance on the ship for the voyage. If either the ship or the voyage be lost, it is a total loss."

In that case, the counsel for the plaintiff contended that the insurance was on the ship, and on the voyage, and insisted, that as the vessel returned unfit for use, it was a total loss. The counsel for the defendants was stopped, and Judge Buller said, "Allowing total loss to be a technical expression, the manner in which the plaintiff's counsel have stated it is rather too broad." Why too broad? Judge Buller answers, "It has been said that the insurance must be taken to be on the ship as well as on the voyage, but the true way of considering it is this; it is an insurance on the ship for the voyage. If either the ship or the voyage be lost, that is a total loss."

In what consists the difference between an insurance on the ship and the voyage, which is laying down the principle too broad, and an insurance on the ship for the voyage, which is the true way of considering it? If the destruction of the voyage by the loss of the cargo is a loss of the ship, then it is an insurance on the ship and the voyage. But this, according to Judge Buller, is not the true principle.

The true principle is, that "it is an insurance on the ship for
[*378] the voyage," *that is, that the voyage shall not be destroyed by the fault of the ship, or, in other words, that the ship shall be capable of making her voyage. And when he says that if either be lost, it is a total loss, he must be understood to mean, if the voyage be lost by the happening to the ship, of any of the perils insured against. To understand Judge Buller otherwise, would be to make him inconsistent with himself; to illustrate a proposition by cases incompatible with that proposition; and to support a distinction by cases which confound the principles intended to be distinguished from each other. But these expressions are used in a case in which the whole contest respected the damage actually sustained by the ship insured, and must be understood in reference to such a case.

So in 1 Term Rep. 615, Mitchell *v.* Edie, Buller, J., says, "A total loss is of two sorts. One where in fact the whole of the property perishes;" (that is, the property insured); "the other where the property exists, but the voyage is lost, or the expense of pursuing it exceeds the benefit arising from it."

This was a case in which the cargo, which was the thing insured, was, by one of the perils insured against, prevented from reaching its destined port, and was greatly damaged. The expressions must be

explained by the case, for the case itself is in view when the expressions are used.

A *dictum* of Judge Buller, in 1 Term Rep. 310, is more applicable to this case than either of those before quoted. He says, "If the ship had arrived, and the goods had been lost, the assured could not have recovered." That was an insurance on the arrival of the ship. It is said that *dictum* was founded on its being a wagering policy; but it appears to be a construction of the terms of the policy. He proceeds to say, that "in policies on interest, if the voyage be lost, it is not necessary to proceed on with the hulk of the ship." But to what case does this apply? To an insurance on goods or on the ship? To a loss of the voyage by default of the thing insured and abandoned, or by default of the thing not insured? The *dictum* is too vague and too unsatisfactory to form the basis of a great
*legal principle of infinite importance in commercial trans- [*379]
actions. If that case be read throughout, *dicta* may be found interspersed through it which militate against the doctrine this single sentence is supposed to support.

In the case of Goss *v.* Withers, 2 Bur. 683, there were two policies, one on the ship and the other on the cargo. The language of Lord Mansfield, in delivering the opinion of the court with respect to the ship, does not even insinuate the idea that any damage sustained by the cargo would have affected the policy on the ship.

In deciding on the claim for the cargo, his language is to be considered with reference to the case itself. It does not appear whether, in the passage quoted from Le Guidon, the author of that work was treating of an abandonment as to the ship or cargo, or both. Nor does it in any degree tend to establish the principle contended for, that after stating the actual total loss of the goods, Lord Mansfield mentions, as an additional circumstance, showing the complete destruction of the voyage, that the ship was lost also.

In the case of Hamilton v. Mendez, 2 Bur. 1198, neither the ship nor cargo was lost. Lord Mansfield puts cases in which there might be a total loss, but those cases are not stated with such precision as to throw any light on the present question. He says it does not absolutely follow that, because there is a recapture, the loss ceases to be total. "If the voyage is absolutely lost, or not worth pursuing," and in many other instances, the owner may disentangle himself, and abandon notwithstanding there has been a recapture.

It is extremely dangerous to take general *dicta* upon supposed cases not considered in all their bearings, and at best, inexplicitly stated, as establishing important law principles. Let the *dictum* in the present case be examined. Suppose the ship and cargo to be

owned by different persons, and insured by different underwriters. If the voyage be lost by the infirmity of the ship, the abandonment might unquestionably be made. If the goods be damaged
[*380] or injured, so as to occasion a technical *total loss, so as to render the voyage not worth pursuing, the owner of the cargo may abandon; but how does this render the voyage not worth pursuing by the owner of the vessel? The value of the cargo does not affect him, or injure the vessel. With respect to him, the voyage is not destroyed. These *dicta* of Lord Mansfield are uttered in terms which demonstrate that no case like the present was in his view at the time, and they are not adapted to such a case.

The cases from Weskett are upon a peculiar kind of policy. They are in the nature of wager policies, and the nature of the undertaking is said to be, that the ship shall perform her voyage in a reasonable time. "In these two last kinds of policies," says Weskett, "valued free from average" and "interest or no interest, it is manifest that the performance of the voyage or adventure in a reasonable time and manner, and not the bare existence of the ship and cargo, is the object of the insurance." This remark applies only to policies of the particular specified description; and even with respect to them it would not appear that the fate of the ship depended on that of the cargo. In illustration of this principle he states the case of The Ludlow Castle, (Weskett on Insurance, 416,) insured from Jamaica to England. She was compelled by one of the perils insured against, to put into Antigua, where she was stopped from proceeding on her voyage, and her cargo was sent to England in another vessel. At the time of the abandonment, and even at the time of the trial, the vessel had not arrived in England, and was not restored to the owner. In this case the voyage was lost by the inability of the vessel to prosecute it.

The case of The Sarah Galley, (Weskett on Insurance, 416,) bears a much stronger resemblance to that under consideration, but is not so fully stated as to give the court all its circumstances. It does not precisely appear what damage was sustained by the seizure at Gibraltar, nor what effect that loss might have on the jury. Nor are we informed at what time, and for what cause the abandonment was made.

But the great objection to that case is, that it was the ver-
[*381] dict of a jury, not the solemn decision of a court, *which verdict was rendered at a time when the law of insurance was not settled, and most probably on a point which has since been overruled in England and in this country. The loss of the ship on a voyage from Gibraltar to Dunkirk could not be the fact on which the plaintiff recovered, because that was a voyage not within the policy. The seizure at Gibraltar was the fact on which the jury founded their

verdict. The defendant contended that this total loss was terminated by the restoration of the ship; "yet as the taking at Gibraltar was a taking whereby the return voyage was prevented, a special jury gave the plaintiff a verdict for a total loss." The verdict, then, is found not on the subsequent actual loss of the vessel, but on the technical loss occasioned by the seizure. This verdict was rendered in the reign of George II. At that time it was doubtful whether a technical total loss occasioned by capture did not vest in the assured a right to abandon, which right was not devested by restoration. In the case of Hamilton v. Mendez, which came on afterwards, this point was perseveringly maintained at the bar, and settled by the court. Had the case of The Sarah Galley been decided after the case of Hamilton v. Mendez, a different verdict must have been rendered. But this decision was given exclusively on the circumstances which had befallen the ship, without a view, so far as is stated, to any loss of the cargo, and is considered by Millar (288) as not being law.

The case of The Anna, (Weskett on Insurance, 416,) turned entirely on the inability of the ship to prosecute her voyage.

The case of The Dispatch Galley, (Weskett on Insurance, 417,) is a case in which we are not informed of the amount of loss occasioned by capture and recapture; and is also a case decided before Hamilton v. Mendez, most obviously upon the principle that the right to abandon, which was vested by the capture, was not devested by the restoration of the vessel. This case serves to show that the verdict in the case of The Sarah Galley did not turn on the subsequent loss of the vessel, for this vessel was not lost. There is in it no allusion to any influence which the loss of a cargo might have on the insurance of a vessel.

*The principles laid down by Millar (284) do not militate [*382] against those which are contained in this opinion. When he speaks of a loss which defeats the voyage, he alludes to a loss which has befallen the thing insured.

The court can find in the books no case which would justify the establishment of the principle, that the loss of the cargo constitutes a technical loss of the vessel, and must, therefore, construe this contract according to its obvious import. It is an insurance on the ship for the voyage, not an insurance on the ship and the voyage. It is an undertaking for the ability of the ship to prosecute her voyage, and to bear any damage which she may sustain during the voyage, not an undertaking that she shall, in any event, perform the voyage.

It is the unanimous opinion of the court that the judgment must be affirmed, with costs.

Judgment affirmed.

3 W. 183; 12 P. 378.

Matthews v. Zane.

4 C. 382.

Under the 25th section of the Judiciary Act, (1 Stats. at Large, 85,) this court has jurisdiction of a question respecting title to land, both parties claiming under the same act of Congress.

Error to the supreme court of the State of Ohio, under the 25th section of the Judiciary Act.

The plaintiff in error claimed title to land in the State of Ohio, under the act of congress, passed in 1800, and the decision of the state court was against him.

The defendant in error also claimed title to the same land under the same act of congress.

The question was, whether in such a case this court had an appellate jurisdiction to revise the judgment of a state court.

[* 383] * *Harper*, for the defendant in error.

P. B. Key, contrà.

Marshall, C. J., declared it to be the opinion of a majority of the judges, that this court has jurisdiction.

That the third article of the Constitution of the United States, when considered in connection with the statute, will give it a more extensive construction than it might otherwise receive.

It is supposed that the act intends to give this court the power of rendering uniform the construction of the laws of the United States, and the decisions upon rights or titles, claimed under those laws.

8 W. 312; 1 P. 655; 16 P. 234; 18 H. 19.

*YOUNG v. THE BANK OF ALEXANDRIA. [*384]

4 C. 384.

The act of February 27, 1801, sec. 8, (2 Stats. at Large, 106,) gives a writ of error to the circuit court for the District of Columbia, though in the particular case all right of appeal had been taken away by the legislation of the State of Virginia.

THIS was a motion to quash a writ of error to the circuit court for the District of Columbia. The grounds of the motion appear in the opinion of the court.

Swann, and *C. Simms*, for the motion.

Youngs, *E. J. Lee*, and *Jones*, contrà.

*MARSHALL, C. J., delivered the opinion of the court as [*396] follows, namely:

This is a motion to quash a writ of error which has issued to a judgment obtained by the Bank of Alexandria in the circuit court for the District of Columbia sitting in Alexandria. In support of the motion, it is contended that no writ of error lies to such a judgment.

The words of the act of Congress of February, 1801, by which the circuit court for the District of Columbia was erected, are these: "Any final judgment, order, or decree, in the said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be reëxamined, and reversed or affirmed, in the supreme court of the United States, by writ of error or appeal."

Upon the operation of this clause in the "Act concerning the District of Columbia," no doubt could be entertained, were it not produced by the last section, which enacts that nothing in that act contained "shall in any wise alter, impeach or impair the right granted by or derived from the acts of incorporation of Alexandria and Georgetown, or of any other body corporate or politic within the district."

The State of Virginia had, in November, 1792, passed an act for establishing a bank in the town of Alexandria, which act incorporated the bank, and, in addition to the privilege of summary process for the recovery *of debts, deprived their debtors of [*397] the right of appeal.

In January, 1801, the legislature of Virginia passed an act continuing the charter of the bank to the 4th of March, in the year 1811, and authorizing them to transact business in the county of Fairfax.

It is the opinion of the majority of the court, under the terms of the cession and acceptance of the district, that the power of legislation remained in Virginia until it was exercised by congress.

But the question recurs, whether that part of the act of Virginia which takes away the right of appeal, taken in connection with the act of congress passed in February, 1801, is now in operation.

The words of the act of congress being as explicit as language can furnish, must comprehend every case not completely excepted from them. The saving clause in the last section only saves existing rights; it does not extend those rights, or give new ones. The act incorporating the bank professes to regulate, and could regulate, only those courts which were established under the authority of Virginia. It could not affect the judicial proceedings of a court of the United States, or of any other State.

There is a difference between those rights on which the validity of the transactions of the corporation depends, which must adhere to those transactions everywhere, and those peculiar remedies which may be bestowed on it. The first are of general obligation; the last, from their nature, can only be exercised in those courts which the power making the grant can regulate. The act of incorporation, then, conferred on the Bank of Alexandria a corporate character, but could give that corporate body no peculiar privileges in the courts of the United States, not belonging to it as a corporation. Those privileges do not exist, unless conferred by an act of congress.

[* 398] * The mere saving in an act of congress which expressly renders all judgments of the circuit court, for a larger sum than one hundred dollars, reëxaminable by writ of error in this court, cannot be considered as exempting judgments rendered in favor of the bank, from the operation of this general enacting clause respecting writs of error. If the act of March, 1801, be considered as giving the bank a right to proceed in the circuit court for Alexandria in the same manner as by the act of incorporation, it might proceed in Virginia, yet that act does not affect the writ of error as given in the act of the 27th of February.

The motion is, therefore, overruled.

8 C. 251; 4 W. 285.

Spiers v. Willison.

4 C. 398.

By the act of Assembly of Virginia of 1758, no gift of a slave was valid, unless in writing and recorded; but parol evidence may be given of the existence of a deed of gift to show the nature of possession which accompanied the deed.

Error to the district court for the district of Kentucky, in an action of *detinue* for certain slaves.

The plaintiff below, Rebecca Willison, claimed title to the slaves under her grandmother, and at the trial offered parol proof that the grandmother, while Kentucky was a part of Virginia, had given them to her by a deed, which was lost. To this testimony the defendant below (the plaintiff in error) objected, and prayed the court to instruct the jury that the said proof was not legal evidence in this cause; and that at the time this gift was supposed to be made, no gift of a slave in Virginia was valid unless made in writing, which writing was afterwards reduced to record; which motion was overruled by the court, and the defendant excepted.

P. B. Key, for the plaintiff in error.

* *Jones* and *Harper*, contrà. [*399]

* Marshall, C. J. The error assigned consists in both [*400] the admission and the operation of the testimony. So far as evidence of the existence of a deed went to show the nature of the possession which accompanied the deed, so far it was admissible; but it was not in itself evidence of any title in the plaintiff. There was no error, therefore, in admitting the testimony as to the deed.

But in overruling the prayer to instruct the jury, "that at the time the gift was said to be made, no gift of a slave was valid unless made in writing, which writing was afterwards reduced to record," the court below is to be considered as having given an opinion that a parol gift was good. This court is, therefore, of opinion, that the court below erred in refusing to give the latter part of the instruction prayed by the defendant.

This court gives no opinion as to the validity of title acquired by possession.

Judgment reversed, and the cause remanded.

4 C. 401.

[*401] *RAMSAY v. LEE.

4 C. 401.

ERROR, to the circuit court of the District of Columbia, in an action of *detinue* for a slave.

[*402] * *Younge*, for the plaintiff in error.

E. J. Lee, contrà.

MARSHALL, C. J., delivered the opinion of the court to the effect following:

The case is the same as that of Willison *v.* Spiers, just de-
[*403] cided, except that in this case the court below gave * the instruction which the court in Kentucky ought to have given.

The opinion of the court was only that a parol gift to the defendant, accompanied by possession, did not bar the plaintiff's right to recover.

This court gives no opinion as to the title acquired by the possession.

Judgment affirmed.

STEAD'S EXECUTORS *v.* COURSE.

4 C. 403.

A plea which contains, in substance, sufficient to bar the bill, if replied to, and found true in fact, is a bar, though defective in form.

A tax collector, in selling land, must conform to the law from which his power is derived, otherwise he makes no title.

If authorized to sell only enough to pay the tax, and he sells an entire tract, when a small part would have been sufficient, the sale is void.

ERROR to the circuit court of the United States for the district of Georgia.

The defendant pleaded, that her late husband, Daniel Course, purchased the land fairly and *bonâ fide* at public sale from the tax-gatherer, for the sum of $552.89, without notice of any claim, title or

interest of the complainants in the said land, if any they have. The plea avers that the consideration money was paid to the tax-gatherer; that * he had a right to sell the land for default in [*404] payment of taxes; that the taxes were not paid at the time of sale, which was publicly made, after legal notice; that Daniel Course took immediate possession, and died seised thereof, and at his death it descended to his heirs, of whom the defendant Elizabeth is one. The deed exhibited was dated May 5th, 1792.

The defendant Elizabeth, also answered the bill, denying fraud, &c.

To the plea there was a replication, denying that the tax-gatherer had a right to sell the land; that the sale was publicly made after legal notice, and that Daniel Course was a fair and *bonâ fide* purchaser, for a valuable consideration, without notice; and averring that the pretended sale and conveyance were unfair, fraudulent and void.

The circuit court sustained the plea, and dismissed the bill with costs.

* *P. B. Key*, for the plaintiffs in error. [*406]

* *Martin*, contrà. [*409]

* Marshall, C. J., delivered the opinion of the court, as [*412] follows:

The plaintiffs, who were the creditors of Rae & Somerville, brought this bill to subject a tract of land in the possession of the defendants to the payment of a debt for which they had obtained a decree against Rae & Somerville.

The defendants plead that Daniel Course, under whom they claim by descent, is a fair purchaser, for a valuable consideration, of the premises in question, at a sale thereof, by the collector of taxes for the county in which they lie, made for taxes in arrear. The defendant also answered, denying fraud.

* A replication was filed to this plea, and, on a hearing, it [*413] was sustained, and the bill dismissed.

In this case the merits of the claim cannot be examined. The only questions before this court are upon the sufficiency of the plea to bar the action, and the sufficiency of the testimony to support the plea as pleaded.

On the first point, the counsel for the plaintiff has adduced authority which would certainly apply strongly, if not conclusively, in his favor, if a special demurrer had been filed to the plea. But as issue has

been taken on it, the court thinks it sufficient, since it contains, in substance, matter which, if true, would bar the action.

The replication puts the matter of the plea in issue, and it is incumbent on the defendants to support it. They prove a sale by the collector on account of taxes, and adduce a deed conveying the premises to the purchaser. But this testimony alone is not sufficient to support the plea. The validity of the sale is the subject of controversy, and its validity depends on the authority of the collector to sell, and on the fairness of the transaction. It would be going too far to say that a collector selling land with or without authority, could, by his conveyance, transfer the title of the rightful proprietor. He must act in conformity with the law from which his power is derived, and the purchaser is bound to inquire whether he has so acted. It is true that full evidence of every minute circumstance ought not, especially at a distant day, to be required. From the establishment of some facts, it is possible that others may be presumed, and less than positive testimony may establish facts. In this case, as in all others depending on testimony, a sound discretion, regulated by the law of evidence, will be exercised. But it is incumbent on the vendee to prove the authority to sell, and the question respecting the fairness of the sale will then stand on the same principles with any other transaction in which fraud is charged.

[*414] *In examining the law under which this sale was made, the court perceives that the collector is authorized to sell land only on the deficiency of personal estate; and then to sell only so much as is necessary to pay the tax in arrear. In this case a sale is made of a whole tract of land, without specifying the amount of taxes actually due for which that land was liable and could be sold. This is proceeding in a manner not strictly regular. The sale ought to have been of so much of the land as would satisfy the tax in arrear. Should it be true that the land was actually liable for the whole sum for which it sold, it would still be incumbent on the vendee to prove that fact; for it cannot be presumed. Every presumption, arising from the testimony in the cause, is against it.

Had this fact been established, the court is inclined to think that the circumstances of the case as stated, though not perhaps amounting to proof of fraud, afford such presumptions as would render a final decree, without further testimony, unsatisfactory, and that an issue ought to have been directed, on the question whether the sale was fraudulent or not. But if a whole tract of land was sold when a small part of it would have been sufficient for the taxes, which at present appears to be the case, the collector unquestionably exceeded his authority, and the plea cannot be sustained.

It is, therefore, the opinion of the court, that there is error in the decree of the circuit court for the district of Georgia, in sustaining the plea of the defendants, and dismissing the bill of the plaintiffs, and that the said decree ought to be reversed and annulled, and the cause remanded, with directions that the defendants shall answer over, and that further proceedings be had in the said cause, according to equity.

Decree reversed.

4 W. 77; 9 H. 248; 16 H. 610.

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*HIGGINSON *v.* MEIN. [*415]

4 C. 415.

The act of the State of Georgia confiscating the land of a mortgagor, did not destroy the estate of a mortgagee in the land.

The treaty of peace, (8 Stats. at Large, 80,) saved liens upon lands for debts.

The presumption of payment from lapse of time may be repelled.

Issue directed as to the fact of payment,

APPEAL from a decree of the circuit court of the United States for the district of Georgia, in a suit to foreclose a mortgage on land, executed in 1769, by A. Wylly, then a resident in Georgia. Wylly took part with the British in the war of the Revolution, and left the State. His estate was confiscated, and in 1784 was sold and conveyed to one Houston, under whom the respondent claimed. The mortgage was duly recorded. The bill was filed in November, 1802. No personal representative of the mortgagor was made a party.

P. B. Key, for the plaintiff.

Harper, for the respondent.

*MARSHALL, C. J., after stating the facts of the case, de- [*418] livered the opinion of the court, as follows:

It is contended, on the part of the purchaser,

1st. That the lands are exonerated from the mortgage by the confiscation and sale thereof made by the State of Georgia.

2d. That they are exonerated by the length of time which has intervened since that confiscation and sale, during which an adverse possession has been held.

3d. That payment of the mortgage is to be presumed.

Several acts of confiscation were passed during the war by the State of Georgia, in which the name of Alexander Wylly is to be found. That under which the defendants in this case claim, was made in the month of May, in the year 1782. That act contains also a clause confiscating generally the estates of British subjects, with the exception of debts due to merchants residing in Great Britain, which were sequestered. The debt due to Greenwood & Higginson came within this exception, and the majority of the court is of opinion, that the lien given by the mortgage on the land of Wylly, for the security of that debt, was not confiscated.

The estate of Wylly, not the interest of Greenwood & Higginson in that estate, being confiscated, it is not to be inferred that the lien of Greenwood & Higginson on that estate was discharged. [*419] The treaty of peace *was made while the estate remained unsold. The fifth article of the treaty, after discovering much solicitude on the part of Great Britain for the entire restoration of confiscated estates, concludes with this clause: "And it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage settlements, or otherwise, shall meet with no lawful impediment in the prosecution of their just rights."

This article applies to those cases where an actual confiscation has taken place, and stipulates expressly, that in such cases the interest of all persons having a lien upon such lands shall be preserved. Neither the confiscation, nor any act in consequence of the confiscation, can constitute a legal impediment to the prosecution of their just rights. The preceding part of the article had contemplated sales of the confiscated property, and, consequently, this clause must have been intended to charge the lands, even in the hands of a purchaser. But respecting its application to this particular case, the court cannot conceive a doubt. The lands, at the time of the treaty, remained unsold, and the government claiming them as confiscated, stipulates through the proper constituted authorities for their liability to this mortgage. If, then, the act of confiscation, independent of the treaty, would be construed to destroy the claim of the mortgagee, the treaty reinstates the lien in its full force, and the subsequent sale of the property could only pass it with the burden imposed upon it.

2d. Is this remedy barred by the act of limitations?

Upon an attentive consideration of that act, it appears to be intended for suits at law, claiming the lands themselves, not to suits in equity, for the purpose of subjecting the lands to the payment of debts for which they are mortgaged. The words of the law would lead to that opinion, and it is confirmed by the consideration that, in such

cases, the possession of the mortgagor, or those claiming under him, is not adverse to, but is compatible with, the rights of the mortgagee. Unless, therefore, this statute has been otherwise construed in Georgia, it would not be considered as applicable to [*420] to such a case as this. But this point must be decided in favor of the plaintiffs, because there is a saving in the act of the rights of persons beyond sea.

3d. Is payment in this case to be presumed?

The length of time which elapsed between the day when this bond and mortgage became payable, and that on which the suit was instituted, is certainly sufficient to warrant a presumption of payment. But this presumption may be met by circumstances which account for the delay in bringing this suit. In this case, the war, and those events which succeeded the war, have not the same influence as in ordinary cases of British debts, because the debtor was within the reach of his creditor from the date of his banishment, in the year 1778, and might have been sued. It does not sufficiently appear in the proceedings where he was, nor what was his situation, to enable the court to judge whether the long delay in bringing this suit is or is not sufficiently accounted for. Neither is it shown satisfactorily that Alexander Wylly has left no personal representative who might show payment of this debt. If there be a personal representative of Alexander Wylly in existence, such person ought to be a party to this suit; if there be no personal representative, some evidence that there is none ought to be adduced. In any event, under all the circumstances of this case, enough does not appear to enable the court to decide whether payment ought to be presumed, or whether the delay in instituting this suit can be accounted for, and the court is, therefore, of opinion that an issue ought to have been directed by the circuit court, for the purpose of ascertaining the fact of payment. The decree of the circuit court is, therefore, to be reversed, and the cause remanded to that court, with instructions to direct an issue to determine whether the bond in the bill mentioned has been paid, and with liberty to the plaintiff to amend his bill, and make new parties, if he shall desire it.

Livingston, J., dissented from this opinion, but did not state his reasons.

[*421] *POLLARD AND PICKETT *v.* DWIGHT et al.

4 C. 421.

If the defendant in a foreign attachment appears, he places himself on the same ground as if he had been personally served with process.

A circuit court may be holden by a district judge, though there is no judge of the supreme court assigned to that circuit.

A covenant of lawful seizin may be broken without an ouster.

Such a covenant is not broken because the title of the grantor was under a patent voidable by the State, but not avoided.

The return of the state surveyor under his oath cannot be invalidated, in an action on a covenant of seizin, by evidence tending to show that he did not in fact make the survey, which he returned.

Parol evidence that there were prior claims on the land is not admissible.

ERROR to the circuit court of the United States for the district of Connecticut. Dwight and others brought a foreign attachment against Pollard & Pickett, returnable to the county court of Hartford, Connecticut, wherein they declared in an action of covenant broken, upon a covenant, contained in a deed of lands lying in Virginia. The declaration averred that the defendant covenanted that they were "lawfully seized of the lands and premises, with their appurtenances, &c., and the breach assigned was that the defendants were not, nor was either of them, lawfully seized of any estate in the land, or in any part thereof.

The defendants appeared and removed the action to the circuit court, and there pleaded in abatement the death of Mr. Justice PATERSON, and that there was no justice of the supreme court assigned to that circuit. Upon demurrer a *respondeas ouster* was awarded, and the defendants pleaded that they were lawfully seized, &c., upon which issue was joined, and the case tried by a jury. At the trial the plaintiffs offered evidence that the defendants' title was grounded on a survey returned as made under the authority of the State of Virginia, and that in point of fact it never was made, and was fraudulent, and also oral evidence, that there were prior claims to the land. The other material facts appear in the opinion of the court.

C. Lee and *Martin*, for the plaintiffs.

Harper, for the defendants.

[*428] *MARSHALL, C. J., delivered the opinion of the court as follows, namely:

In this case objections have been made to the jurisdiction of the circuit court, and to the proceedings in that court.

The point of jurisdiction made by the plaintiffs in error is considered as free from all doubt. By appearing to the action, the defendants in the court below placed themselves precisely in the situation in which *they would have stood, had pro- [*429] cess been served upon them, and, consequently, waived all objections to the non-service of process. Were it otherwise, the duty of the circuit court would have been to remand the cause to the state court in which it was instituted, and this court would be bound now to direct that proceeding. As little foundation is there for the exception taken to the manner in which the circuit court was constituted. That court consists of two judges, any one of whom is capable of performing judicial duties. So this court consists of seven judges, any four of whom may act. It has never been supposed that the death of three of the judges would disqualify the remaining four from discharging their official duties until the vacant seats of their departed brethren should be filled. There is nothing in the peculiar phraseology of that part of the Judicial Act[1] which establishes the circuit courts, that requires a different construction of the words authorizing a single judge to hold those courts, from what is usually given in other cases, to clauses authorizing a specified number of justices to constitute a court.

The exceptions taken to the proceedings of the circuit court are more serious. These are,

1. To the pleadings:

2. To the opinions of that court, admitting certain testimony in support of the action.

The objections to the pleadings are,

That the different parts of the declaration are repugnant to each other; and that the declaration is itself insufficient, as the foundation of a judgment.

In deciding on so much of this objection as depends on the laws of Connecticut, this court would certainly be guided by the construction given by that State to its own statute; and, if it was indispensably necessary now to decide that question, the evidence in favor of the construction maintained by the defendants in error would seem to preponderate.

*Another objection taken to the declaration is, that it [*430] ought to have alleged a disseisin of the plaintiffs below, in order to enable them to maintain their action.

On this part of the case, the court can only consider whether the declaration in itself, unconnected with the testimony which was ad-

[1] 1 Stats. at Large, 73.

duced to support it, is so radically defective, that a judgment cannot be rendered on it. This leads to the inquiry, whether the covenant of the vendors can be broken, as stated in the declaration, although no eviction has taken place; and the court is of opinion that it may be so broken. 9 Co. 60.

The covenant is, that the vendor is seized in fee of the premises which he sells and conveys. Suppose the fact to be that he had no title, nor pretence of title, to those premises; that he had conveyed lands for which he had never received a patent or a title of any kind. Could it be said that his covenant that he was seized in fee remained unbroken until the real proprietor should think proper to eject the vendee? This question, in the opinion of the court, must be answered in the negative. The testimony which would be sufficient to establish the breach assigned, may be a subject for serious consideration, but on the sufficiency of the breach, as assigned to support a judgment, there is no doubt.

The exceptions to the testimony admitted in the circuit court consists of two parts.

1. To the admission of certain copies of surveys made for Wilson Carey Nicholas, connected with the testimony of Erastus Granger, describing the face of the country on which the surveys purported to be made.

2d. To the admission of parol testimony to prove prior titles to the lands conveyed in the deed on which this suit was instituted.

1. The surveys of Wilson Carey Nicholas, and the explanatory testimony of Granger, were introduced for the purpose of showing that the patent for the lands sold by Pollard & Pickett was
[* 431] void, because it issued on a *plat representing a survey which, in point of fact, could not have been made.

In examining this exception, it becomes proper to inquire what was the real issue between the parties.

The plaintiffs below averred in their declaration, that the defendants were not seized and possessed of any estate whatever in the land and premises, nor in any part thereof, nor had they, or either of them good right and lawful authority to sell and convey the same. The defendants, in their plea, do not set forth their title, but say, generally, that they were seized of the land sold and conveyed by them, and had good right to sell and convey the same, as is expressed by their deed. On this plea an issue is tendered, which is joined by the plaintiffs.

To prove that the survey on which the patent granting the lands to the defendants was issued could not have been made, the plaintiffs produced two other surveys made by the same person for Wilson

Carey Nicholas, which were said to be completed only two days succeeding the completion of the survey of the defendants, which three several surveys could not possibly have been made in the time intervening between the entries in the surveyor's office and the day on which they are alleged to have been completed, whence the jury might conclude that the survey of Pollard & Pickett was not made.

The surveyor was a sworn officer, and his survey was returned upon oath. This is an attempt to invalidate the evidence derived from his official return, by a particular fact which has no relation to the cause before the court, and with which the parties to this controversy have no connection. Had it even appeared that the copies offered in evidence were authenticated, they would, on this account, have been inadmissible.

This whole testimony is inadmissible on other ground. Were it even true that this patent is voidable, if the surveyor had not run round all the lines of the land, a *point not yet [* 432] established, it cannot be deemed absolutely void; it cannot be deemed a mere nullity. While it remains in force it is a valid title, and vests the fee-simple estate in the patentee. In this action, and on the trial of this issue, the question whether the patent be voidable by Virginia or not, is not properly examinable. Testimony, therefore, tending to establish that point, is irrelevant and inadmissible.

2. But had the court entertained any doubt on this point, the second part of the exception would be clearly decisive with regard to this judgment.

Parol testimony is admitted to show prior claims to the land in controversy. The defendants in error attempt to defend the admission of this testimony, by supposing it auxiliary to other testimony which had previously established the validity of those claims, and that this witness was only adduced to show that those claims covered this land. Had the fact supported the argument, a private *ex parte* survey would have been a very improper mode of establishing it; but the language of the exception excludes that construction of the opinion which the counsel for the defendants in error would put upon it. The proof offered and admitted is, not that those particular titles which were exhibited and proved to the court covered the land conveyed by Pollard & Pickett, but "that there were prior claims upon it to the amount of upwards of ninety thousand acres." The prior claims rest upon the oath of the witness. If those claims were valid, their validity was established by his testimony, which cannot be tolerated on any legal principle; if they were mere claims, not good titles, they ought not to have been stated to the jury. They were irrelevant to the point in issue.

Upon the whole, the court is unanimously of opinion, that the circuit court erred in permitting the copies of surveys made for Wilson Carey Nicholas, and the testimony of Erastus Granger, to go to the jury for the purposes mentioned in the bill of exceptions, and [* 433] * that the judgment of the circuit court must, on that account, be reversed, and the cause remanded for a new trial.[1]

Judgment reversed.

12 P. 300; 4 H. 131; 8 H. 451

Ex parte Lewis and others.

4 C. 433.

In the circuit court for the district of Pennsylvania, at November term, 1806, a motion was made by *Rawle*, in behalf of Lewis and others, (the jurors in civil cases, who had attended the court at that session,) that the marshal be ordered to pay each of the jurors one dollar and twenty-five cents for each day's attendance;

But the judges of that court being divided in opinion upon the question, it was certified to this court.

This court ordered it to be certified that the jurors were entitled to the fee of one dollar and twenty-five cents per diem for their attendance.

[1] After the opinion of the court was delivered, *Lee* prayed that the cause might be remanded, with leave for the defendants below to amend their pleadings.

The Court said, that the court below had the power to grant leave to amend, and this court could not doubt but it would do what was right in that respect.

CROUDSON and others *v.* LEONARD. [*434]

4 C. 434.

The sentence of a foreign court of admiralty condemning a vessel for breach of blockade, is conclusive evidence of that fact in an action on the policy of insurance.

ERROR to the circuit court of the District of Columbia, in an action on a policy of insurance on the cargo of the brig Fame, on a voyage from Alexandria, to, at, and from Barbadoes and four other ports in the West Indies, and back to Alexandria, the vessel and cargo warranted American property. The vessel arrived at Barbadoes, and sailed from thence for Antigua, but on her voyage to that island was captured by a British vessel and carried into Barbadoes, and there condemned in the vice-admiralty court, for attempting to break the blockade of Martinique.

The jury found a special verdict, upon which the judgment below was in favor of the plaintiffs.

The only question arising upon this special verdict was, whether the sentence of the court of vice-admiralty was conclusive evidence of an attempt to violate the blockade of Martinique.

This question having been several times argued, (but not decided,) in the case of Fitzsimmons *v.* The Newport Insurance Company, at this term, (4 C. 185,) the counsel submitted it to the court without further argument.

JOHNSON, J. The action below was instituted on a policy of insurance.

On behalf of the insurers, it was contended that the policy was forfeited by committing a breach of blockade. It is not, and cannot be made a question, that this is one of those acts which will exonerate the underwriters from their liability. The only point below was relative to the evidence upon which the commission of the [*435] act may be substantiated. A sentence of a British prize court in Barbadoes was given in evidence, by which it appeared that the vessel was condemned for attempting to commit a breach of blockade. It is the English doctrine, and the correct doctrine on the law of nations, that an attempt to commit a breach of blockade is a violation of belligerent rights, and authorizes capture. This doctrine is not denied, but the plaintiff contends that he did not commit such

an attempt, and the court below permitted evidence to go to the jury to disprove the fact on which the condemnation professes to proceed.

On this point, I am of opinion that the court below erred.

I do not think it necessary to go through the mass of learning on this subject, which has so often been brought to the notice of this court, and particularly in the case of Fitzsimmons, argued at this term. Nearly the whole of it will be found very well summed up in the 18th chapter of Mr. Park's Treatise. The doctrine appears to me to rest upon three very obvious considerations; the propriety of leaving the cognizance of prize questions exclusively to courts of prize jurisdiction; the very great inconvenience, amounting nearly to an impossibility, of fully investigating such cases in a court of common law, and the impropriety of revising the decisions of the maritime courts of other nations, whose jurisdiction is coördinate throughout the world.

It is sometimes contended that this doctrine is novel, and that it takes its origin in an incorrect extension of the principle in Hughes *v.* Cornelius, Raym. R. 473. I am induced to believe that it is coeval with the species of contract to which it is applied. Policies of insurance are known to have been brought into England from a country that acknowledged the civil law. This must have been the law of policies at the time when they were considered as contracts proper for the admiralty jurisdiction, and were submitted to the court of policies established in the reign of Elizabeth. It is probable that, at the time when the common law assumed to itself exclusive jurisdic-
[* 436] tion of the contract of insurance, the rule was * too much blended with the law of policies to have been dispensed with, had it even been inconsistent with common law principles. But, in fact, the common law had sufficient precedent for this rule, in its own received principles relative to sentences of the civil law courts of England. It may be true that there are no cases upon this subject prior to that of Hughes *v.* Cornelius, but this does not disprove the existence of the doctrine. There can be little necessity for reporting decisions upon questions that cannot be controverted. Since the case of Hughes *v.* Cornelius, the doctrine has frequently been brought to the notice of the courts of Great Britain in insurance cases, but always with a view to contest its applicability to particular cases, or to restrict the general doctrine by exceptions, but the existence of the rule, or its applicability to actions on policies, is nowhere controverted.

I am of opinion that the sentence of condemnation was conclusive evidence of the commission of the offence for which the vessel was condemned, and as that offence was one which vitiated the policy, the defendants ought to have had a verdict.

WASHINGTON, J. The single question in this case is, whether the sentence of the admiralty court at Barbadoes, condemning the brig Fame and her cargo as prize, for an attempt to break the blockade of Martinique, is conclusive evidence against the insured, to falsify his warranty of neutrality, notwithstanding the fact stated in the sentence as the ground of condemnation is negatived by the jury?

This question has long been at rest in England. The established law upon this subject in the courts of that country is, that the sentence of a foreign court of competent jurisdiction, condemning the property upon the ground that it was not neutral, is so entirely conclusive of the fact so decided, that it can never be controverted, directly or collaterally, in any other court having concurrent jurisdiction.

This doctrine seems to result from the application of a legal principle which prevails in respect to domestic *judg- [*437] ments, to the judgments and sentences of foreign courts.

It is a well-established rule in England, that the judgment, sentence, or decree of a court of exclusive jurisdiction directly upon the point, may be given in evidence as conclusive between the same parties, upon the same matter coming incidentally in question in another court for a different purpose. It is not only conclusive of the right which it establishes, but of the fact which it directly decides.

This rule, when applied to the sentences of courts of admiralty, whether foreign or domestic, produces the doctrine which I am now considering, upon the ground that all the world are parties in an admiralty cause. The proceedings are *in rem*, but any person having an interest in the property may interpose a claim, or may prosecute an appeal from the sentence. The insured is emphatically a party, and in every instance has an opportunity to controvert the alleged grounds of condemnation, by proving, if he can, the neutrality of the property. The master is his immediate agent, and he is also bound to act for the benefit of all concerned, so that, in this respect, he also represents the insurer. That irregularities have sometimes taken place, to the exclusion of a fair hearing of the parties, is not to be denied. But this furnishes no good reason against the adoption of a general rule. A spirit of comity has induced the courts of England to presume, that foreign tribunals, whether of prize or municipal jurisdiction, will act fairly, and will decide according to the laws which ought to govern them; and public convenience seems to require, that a question, which has once been fairly decided, should not be again litigated between the same parties, unless in a court of appellate jurisdiction.

The irregular and unjust decisions of the French courts of admiralty, of late years, have induced even English judges to doubt

of the wisdom of the above doctrine in relation to foreign sentences, but which they have acknowledged to be too well established for English tribunals to shake; and the justice with which [* 438] the same * charge is made by all neutral nations against the English as well as against the French courts of admiralty, during the same period, has led many American jurists to question the validity of the doctrine in the courts of our own country. It is said to be a novel doctrine, lately sprung up, and acted upon as rule of decision in the English courts, since the period when English decisions have lost the weight of authority in the courts of the United States. It is this position which I shall now examine, acknowledging that I do not hold myself bound by such decisions made since the revolution, although, as evidence of what the law was prior to that period, I read and respect them.

The authority of the case of Hughes *v.* Cornelius, the earliest we meet with as to the conclusiveness of a foreign sentence, is admitted; but its application to a question arising under a warranty of neutrality between the insurer and insured, is denied. It is true that, in that case, the only point expressly decided was, that the sentence was conclusive as to the change of property effected by the condemnation. But it is obvious that the point decided in that case depended, not upon some new principle peculiar to the sentences of foreign courts, but upon the application of a general rule of law to such sentences.

This case, as far as it goes, places a foreign sentence upon the same foundation as the sentence or decree of an English court acting upon the same subject; and we have seen that, by the general rule of law, the latter, if conclusive at all, is so as to the fact directly decided, as well as to the change of property produced by the establishment of the fact. Hence it would seem to follow, that if the sentence of a foreign court of admiralty be conclusive as to the property, it is equally conclusive of the matter or fact directly decided. What is the matter decided in the case under consideration? That the vessel was seized whilst attempting to break a blockade, in consequence of which she lost her neutral character; and the change of property produced by the sentence of condemnation is a consequence of the matter decided, that she was, in effect, enemy-property. Can [* 439] the parties to that sentence be bound by so much of * it as works a loss of the property, because it was declared to be enemy-property, and yet be left free to litigate anew in some other form, the very point decided from which this consequence flowed? Or upon what just principle, let me ask, shall a party to a suit, who has once been heard, and whose rights have been decided by a competent tribunal, be permitted, in another court of concurrent jurisdic-

tion, and, in a different form of action, to litigate the same question, and to take another chance for obtaining a different result? I confess I am strongly inclined to think that the case of Hughes *v.* Cornelius laid a strong foundation for the doctrine which was built upon it, and which for many years past has been established law in England. This opinion is given with the more confidence, when I find it sanctioned by the positive declarations of distinguished law characters; men who are, of all others, the best able to testify respecting the course of decisions upon the doctrine I am examining, and the source from which it sprung.

In the case of Lothian *v.* Henderson, 3 Bos. & Pull. 499, Chambre, J., speaking upon this point, says, that the sentence of the French court was in that case conclusive against the claim of the assured, "agreeable to all the decisions upon the subject, beginning with the case of Hughes *v.* Cornelius, (confirmed as that was by the opinion of Lord Holt in two subsequent cases,) and pursuing them down to the present period. "It is true," he observes, "that in Hughes *v.* Cornelius, the question upon the foreign sentence arose in an action of trover, and not in an action on a policy of assurance, where the non-compliance with a warranty of neutrality is in dispute. But from that period to the present, the doctrine there laid down respecting foreign sentences has been considered equally applicable to questions of warranty in actions on policies, as to questions of property in actions of trover." Le Blanc, J., says, "that these sentences are admissible and conclusive evidence of the fact they decide it seems not safe now to question; from the time of Charles II. to this day, they have been received as such, without being questioned. In the discussion of the nature of such evidence before this *house, in [*440] 1776, it seems not to have been controverted; and the cases, I may say, are numberless, and the property immense, which have been determined on the conclusiveness of such evidence, in many of which cases, the forms in which they came before the courts in Westminster Hall were such as to have enabled the parties, if any doubt had been entertained, to have brought the question before a higher tribunal." Lawrence, J., also speaking of the legal effect of a foreign sentence upon this point, says, "as to which, after the continued practice which has taken place from the earliest period, in which, in actions on policies of insurance, questions have arisen on warranties, to admit such sentences in evidence, not only as conclusive *in rem*, but also as conclusive of the several matters they purport to decide directly, I apprehend it is now too late to examine the practice of admitting them to the extent to which they have been received, supposing that practice might, upon the argument, have appeared to have

been doubtful at first." Rooke, J., Lord Eldon, and Lord Alvanley, all concur in giving the same testimony, that the doctrine under consideration had been established for a long period of years, by a long series of adjudications in the courts of Westminster Hall.

I cite this case for no other purpose but to prove, by the most respectable testimony, that the case of Hughes *v.* Cornelius, decided in the reign of Charles II. had, by a uniform course of decisions from that time, been considered as warranting the rule now so firmly established in England. And when the inquiry is, whether the application of the principle laid down in that case to questions arising on warranties in actions on policies, be of ancient or modern date, I think I may safely rely upon the declarations of the English judges, when they concur in the evidence they give respecting the fact. It is true that no case was cited at the bar recognizing the application of the rule to questions between the insurer and insured prior to the Revolution, except that of Fernandez *v.* Da Costa, Park Ins. 287, which I admit was a *Nisi Prius* decision. But were I convinced that the long series of decisions upon this point, from the time of Hughes *v.* Cornelius, spoken of by the judges in the case of Lothian *v.* Henderson, [*441] had been made at *Nisi Prius*, it *would not, in my mind, weaken the authority of the doctrine. It would prove the sense of all the judges of England, as well as of the bar, of the correctness and legal validity of the rule. It is not to be supposed that if a doubt had existed respecting the law of those decisions, the point would not have been reserved for a more deliberate examination, before some of the courts of Westminster Hall. But the case of Fernandez *v.* Da Costa receives additional weight, when it is recollected that the judge who decided it was Lord Mansfield, and when, upon examining it, we find no intimation from him that there was any novelty at that day in the doctrine. To this strong evidence of the antiquity of the rule, may be added that of Judge Buller, who, at the time he wrote his Nisi Prius, considered it as then established.

That the doctrine was considered as perfectly fixed in the year 1781, is plainly to be inferred, from the case of Bernardi *v.* Motteux, 2 Dougl. 574, decided in that year. Lord Mansfield speaks of it as he would of any other well-established principle of law, declaring, in general terms, that the sentence, as to that which is within it, is conclusive against all persons, and cannot be collaterally controverted in any other suit. The only difficulty in that case was, to discover the real ground upon which the foreign sentence proceeded, and the court in that and many subsequent cases laid down certain principles auxiliary to the rule, for the purpose of ascertaining the real import of the sentence in relation to the fact decided as between the insurer and

insured. For if the sentence did not proceed upon the ground of the property not being neutral, it of course concluded nothing against the insured; since upon no other ground could the sentence be said to falsify the warranty.

It was admitted by the counsel for the insured, that as between him and the insurer, the sentence is *primâ facie* evidence of a non-compliance with the warranty. But if they are right in their arguments as to the inconclusiveness of the sentence, I would ask for the authority upon which the sentence can be considered as *primâ facie* evidence. Certainly no case was referred *to, and I [*442] have not met with one to warrant the position. If we look to general principles applicable to domestic judgment, they are opposed to it. We have seen that the judgment is conclusive between the same parties, upon the same matter coming incidentally in question. The judgment of a foreign court is equally conclusive, except in the single instance where the party claiming the benefit of it applies to the courts in England to enforce it, in which case only the judgment is *primâ facie* evidence. But it is to be remarked, that in such a case, the judgment is no more conclusive as to the right it establishes, than as to the fact it decides. Now it is admitted that the sentence of a foreign court of admiralty is conclusive upon the right to the property in question; upon what principle, then, can it be *primâ facie* evidence, if not conclusive, upon the facts directly decided. A domestic judgment is not even *primâ facie* evidence between those not parties to it, or those claiming under them, and that would clearly be the rule, and for a similar reason as to foreign judgments. If between the same parties, the former is conclusive as to the right and as to the facts decided, this principle, if applied at all to foreign sentences, which it certainly is, is either applicable throughout, upon the ground that the parties are the same, or if not so, then by analogy to the rule applying to domestic judgments, the sentence cannot be evidence at all.

Upon the whole, I am clearly of opinion, that the sentence of the court of admiralty at Barbadoes, condemning the brig Fame and her cargo as prize, on account of an attempt to break the blockade of Martinique, is conclusive evidence in this case against the insured, to falsify his warranty of neutrality.

If the injustice of the belligerent powers, and of their courts, should render this rule oppressive to the citizens of neutral nations, I can only say with the judges who decided the case of Hughes *v.* Cornelius, let the government in its wisdom adopt the proper means to remedy the mischief. I hold the rules of law, when once firmly established, to be beyond the control *of those who [*443]

are merely to pronounce what the law is, and if from any circumstance it has become impolitic, in a national point of view, it is for the nation to annul or to modify it. Till this is done, by the competent authority, I consider the rule to be inflexible.[1]

9 C. 126.

THE UNITED STATES *v.* The Schooner BETSEY AND CHARLOTTE, and her Cargo.

4 C. 443.

The district courts have admiralty jurisdiction of all seizures made on waters navigable from the sea, by vessels of ten or more tons burden.

APPEAL from a decree of the circuit court for the District of Columbia, reversing the decree made by the district court, in favor of the United States, upon a libel to enforce a forfeiture of these vessels and cargoes for breaches of the act of February 28th, 1806, (2 Stats. at Large, 351.) The question raised in this court was, whether the proceedings should not have been according to the course of the common law.

C. Lee, for the claimants.

Jones and *Rodney*, attorney-general, for the United States.

[*452] *MARSHALL, C. J. The court considers the law as completely settled by the case of The Vengeance. A distinction has been attempted to be drawn between this case and that, but the court can see no difference. It is the place of seizure, and not the place of committing the offence, which decides the jurisdiction.

It has been said the word "including" means moreover, or as well as; but if this was the meaning of the legislature it was a very embarrassing mode of expressing the idea. It is clear that congress

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[1] Judges CHASE and LIVINGSTON dissented; and Judge TODD, not having been present at the argument, gave no opinion. So that this judgment is reversed by the opinions of MARSHALL, C. J., CUSHING, WASHINGTON, and JOHNSON, Justices.

meant to discriminate between seizures on waters navigable from the sea, and seizures upon land or upon waters not navigable; and to class the former among the civil causes of admiralty and maritime jurisdiction.

The only doubt which could arise would be upon the clause of the constitution respecting the trial by jury. But the case of The Vengeance settles that point.

The sentence of the circuit court was reversed, and that of the district court affirmed.

7 C. 112; 1 W. 9; 8 W. 391; 5 H. 441; 6 H. 344.

DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1809.

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*The United States v. Weeks.

5 C. 1.

The writ of error in this case was dismissed by the assent of the attorney-general, it having been issued from this court directly to the district court for Maine district; whereas by the 10th section of the Judiciary Act of 1789, vol. 1, p. 55,[1] writs of error lie from decisions in that court to the circuit court of Massachusetts in the same manner as from other district courts to their respective circuit courts; notwithstanding that the district court of Maine has all the original jurisdiction of a circuit court.

Charles Alexander v. The Mayor and Commonalty of Alexandria.

5 C. 1.

The corporation of Alexandria has power to tax the lands of non-residents, lying within the corporate limits.

The power is not confined to half-acre lots.

But the tax cannot be recovered by motion, if the non-resident owner has other property within the town.

Error to the circuit court for the District of Columbia. The judgment was rendered on motion, for a sum of money assessed on

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[1] 1 Stats. at Large, 77.

land for taxes. The material facts and the provisions of the Statutes of Virginia on which the case turned, are stated in the opinion of the court.

C. Simms, for the plaintiff.

Swann, for the defendants.

*MARSHALL, C. J., delivered the opinion of the court, as [*6] follows, namely:

In the proceedings in this cause two errors are assigned by the plaintiff.

1st. That the corporation had no power to assess the tax for which the judgment was rendered.

2d. That the judgment is irregular, because rendered on motion.

*Both these points are to be decided by the several acts [*7] of the legislature of Virginia respecting the town of Alexandria.

In support of the first it is contended,

1st. That the corporation has no power to tax property not belonging to an inhabitant of the town; and Charles Alexander was not an inhabitant.

2d. That the property, on which this tax was assessed, was not within the corporation.

The words of the act of 1779, which is the first act shown to the court that confers the power of taxation, are these: "The mayor, recorder, aldermen and common councilmen shall have power to erect and repair work-houses, houses of correction and prisons, or other public buildings, for the benefit of the said town; and to make by-laws and ordinances for the regulation and good government of the said town; provided such by-laws or ordinances shall not be repugnant to, or inconsistent with, the laws and constitution of this commonwealth, and to assess the inhabitants for the charge of repairing the streets and highways."

For the plaintiff, it is contended, that the power of taxation, here given, is, in terms, confined to assessments made on the inhabitants. On the part of the defendants it is urged, that the express power to assess the inhabitants, is for the sole purpose of improving their streets, and that an express power is also given to make expensive establishments, the means of erecting which could be furnished only by taxes; that the power to make by-laws must therefore necessarily be construed to involve the power of taxing, at least for these objects.

Without deciding this question, as depending merely on the original law, it is to be observed that acts *in pari materia* are to be construed together as forming one act. If in a subsequent clause of
[*8] the same act provisions are introduced, which show *the sense in which the legislature employed doubtful phrases previously used, that sense is to be adopted in construing those phrases. Consequently, if a subsequent act on the same subject affords complete demonstration of the legislative sense of its own language, the rule which has been stated, requiring that the subsequent should be incorporated into the foregoing act, is a direction to courts in expounding the provisions of the law.

The act of the 16th of December, 1796, contains this clause: "It shall and may be lawful for the mayor and commonalty of the town of Alexandria to recover, of and from all and every person or persons holding land within the limits of the said town, and who have no other property within the said town on which the taxes or assessments imposed on such property for paving the streets therein can be levied, the amount of such taxes or assessments, by motion in the court of the county or corporation where such person or persons reside."

This clause most obviously contemplates a full right to assess taxes on property lying within the town and belonging to non-residents; for it gives a right to recover such assessment in the court of any county or corporation in which the owner of such property may reside. It is either a legislative exposition of a power formerly granted, or the grant of a new power.

If the words of the enacting clause could admit of doubt, the proviso would remove that doubt. It is, that the clause which has been recited should not "be so construed as to empower the court to give judgment against any person or persons, residing out of the limits of the corporation of Alexandria, and owning ground therein, having no house on it, where the service, to compensate which the tax or assessment has been or may be imposed, has been or may be performed before the last day of February, 1797; but for the collection of such tax the same means may be used which would have been lawful before the passage of this act."
[*9] *This proviso shows, as clearly as words can show, the sense of the legislature in favor of taxing the land of non-residents.

The same act appears to the court to remove any doubt, which might otherwise exist, respecting the second branch of this question.

Upon a critical examination of the act of the 13th of December,

1796, the court would feel much difficulty in declaring that it comprehended in the corporation of Alexandria only that ground which was actually divided into half-acre lots, and the court would be the less inclined to take this distinction, because no inducement for making it is to be found in the nature of the thing, or could have existed with the legislature.

The preamble states the lots, represented as contiguous to the town of Alexandria, to have been laid off by the proprietors, in lots of half an acre each, within certain limits which are described by the law. The enacting clause drops the quantity of which a lot is to consist, and declares that every lot, or part of a lot, within the limits described, which had been or should be improved, should be made part of the town of Alexandria. The act of 1798 annexes to the town all the unimproved lots within those limits. The case finds that the property on which the tax for which the judgment is rendered was imposed, is within those limits, and was laid off as part of the town in squares of two acres, but these squares were not actually subdivided into half-acre lots.

The term half-acre, used in the preamble of the act of 1796, is a description of a circumstance probably contained in the representation on which the law was founded. But it is impossible to consider that part of the representation as material to the law. If the squares were regularly laid out, the subdivisions of those squares were unimportant, for that subdivision would always depend on the caprice of purchasers and sellers. Lots and parts of lots might *be separated, or annexed to each other, at will. The [*10] enacting clause, therefore, of the first act, comprehends every lot, or part of a lot, within the described limits, which had been or should be improved; and the enacting clause of the act of 1798 comprehends every lot within those limits. That a square comprehended in those limits, laid off as part of the town, and containing precisely four half-acre lots, should be considered as excluded from the town, and not liable to taxation for the improvement of the streets, for the single reason that the proprietor had not marked thereon the lines of subdivision, would not be readily conceded.

But if a doubt respecting the sense of the legislature could otherwise be entertained, that doubt is removed by the act of the 16th of December, 1796, already recited, which particularly respects the power of taxation, and gives the remedy by motion.

That act drops the term "lot," and uses the term "land." It authorizes the corporation to recover by motion against any person "holding land within the limits of the town" "the taxes or assessments imposed thereon." The proviso, which has been also recited,

uses the term "ground," and considers every person owning ground within those limits as liable to be taxed. The 3d section of the same act declares, "that when the proprietor of any lot or ground within the said town shall fail to fill up any pond of water, or remove any nuisance," as directed by the corporation, the mayor and commonalty may exercise corporate powers in the case. If the squares in question do not consist of lots, because the subdivisions have not been actually marked, yet they consist of land, they consist of ground, and being within the limits of the town, they are, in the opinion of the court, within the corporation, and subject to taxation.

But the remedy in the actual case is not by motion. The act affording this remedy gives it only in a specified case. It is given only in the case of "a person or persons holding land within
[*11] the limits of *the said town, and who have no other property within the said town." This is not, as has been said, a direction to the officer of the corporation, but is a description of the precise case, in which alone, the remedy by motion is allowed. It being found that Charles Alexander had property in the town from which the officer could have levied the tax assessed on him, a motion for that tax was not sustainable. If the corporation did not choose to risk levying the tax by seizure, they might have instituted a suit to determine their right.

This Court is unanimously of opinion, that the circuit court erred in giving judgment for the plaintiff on motion, and therefore directs that the said judgment be reversed and annulled.

Henderson v. Moore.

5 C. 11.

Refusal of a new trial cannot be assigned as error.

An acknowledgment that payment of a less sum than that secured by a bond, is in full satisfaction of all claims, is evidence that only that balance remained due, in consequence of prior payments.

Error to the circuit court for the District of Columbia. The action was debt on bond. Two errors were assigned. The first was, that the court instructed the jury that evidence of an acknowledgment by the obligee, that a sum, less than amount of the bond, was *received in full of all his claims, would warrant a finding that the

whole amount due on the bond had been paid. The second was, the refusal to grant a new trial.

* MARSHALL, C. J., delivered the opinion of the court. [* 12]

That there was no error in the opinion of the court below. A part of the money due on the bond * might have been [* 13] paid before; and such an acknowledgment, upon receipt of a sum smaller than the amount of the condition of the bond, was good evidence upon the plea of payment.

Judgment affirmed, with costs.

9 W. 576; 1 P. 165; 5 H. 215; 7 H. 185.

COOKE and others *v.* WOODROW.

5 C. 13.

Due diligence to find a subscribing witness must be shown, before evidence of his handwriting is admitted.

ERROR to the circuit court for the District of Columbia. In the course of the trial, a writing purporting to be signed in presence of a subscribing witness, was offered in evidence. It appeared that the subscribing witness had upwards of a year ago left the District of Columbia, and that before he left the said district he declared that he should go to the northward, that is to say, to Philadelphia or New York, and said he had a wife in New York. That the said subscribing witness went from the said district to Norfolk, and that when he got there, he declared that he should go on further to the south, but where was not known, and that he has not been heard of by the witness for the last twelve months. It appeared that a subpœna had been issued in this case, for the said subscribing witness, directed to the marshal of the District of Columbia, but he could not be found in the said district, by the said marshal. The plaintiff then offered to prove the handwriting of the subscribing witness to the said writing, but the court refused to permit the plaintiffs to produce evidence of the handwriting of the said subscribing witness, and refused to permit the plaintiffs to prove the handwriting of John Withers, the person by whom the paper purported to be signed, otherwise than by the testimony of the said * subscribing witness; to which refusal the plaintiffs excepted." [* 14]

C. Simms, for plaintiffs in error.

MARSHALL, C. J., after stating the case as it appeared in the bill of exceptions, observed —

That the court had some difficulty upon the point. The general rule of evidence is, that the best evidence must be produced which the nature of the case admits, and which is in the power of the party. In consequence of that rule, the testimony of the subscribing witness must be had if possible. But if it appear that the testimony of the subscribing witness cannot be had, the next best evidence is proof of his handwriting. In the present case it does not appear to the court, that the testimony of the subscribing witness could not have been obtained, if proper diligence had been used for that purpose. It does not appear that the witness had ever left Norfolk. It is not stated, that any inquiry concerning him had been made there. If such inquiry had been made, and he could not be found, evidence of his handwriting might have been permitted. But

[* 15] *as the case appears in the bill of exceptions, the court below has not erred.

Judgment affirmed, with costs.

9 W. 227; 3 P. 33; 16 P. 327.

MANDEVILLE AND JAMESSON v. WILSON.

5 C. 15.

The exception of merchants' accounts, in the Statute of Limitations of Virginia, applies to actions of assumpsit as well as account.

An account closed by the cessation of dealings is not an account stated.

It is not necessary that any item should come within the five years.

ERROR to the circuit court for the District of Columbia, in an action of assumpsit for goods sold and delivered, and for the hire of a slave. The defendants pleaded the general issue and the statute of limitations. To the latter plea, the plaintiff replied, that the causes of action concerned the trade of merchandise, and became payable on an account current between the parties as merchants. The defendants rejoined that in January, 1799, their partnership was dissolved, and public notice thereof given; that the plaintiff had notice thereof, and since that time there have been no dealings and no accounts

between the parties. The plaintiff surrejoined that the causes of action accrued before the said dissolution. The defendants demurred, and judgment was given for the plaintiff.

Youngs, for the plaintiffs in error.

E. J. Lee, for the defendant in error.

* MARSHALL, C. J., delivered the opinion of the court. [* 18]
That the exception in the statute applied to actions of assumpsit, as well as to actions of account. That it extended to all accounts current which concern the trade of merchandise between merchant and merchant. That an account closed by the cessation of dealings between the parties is not an account * stated, [* 19] and that it is not necessary that any of the items should come within the five years. That the replication was good, and not repugnant to the declaration; and that the rejoinder was bad.

Judgment affirmed, with costs.

5 C. 351; 9 W. 576; 6 P. 151.

FAIRFAX'S EXECUTOR *v.* ANN FAIRFAX.

5 C. 19.

Upon the issue of *plene administravit*, the jury must find specially, the amount of assets in the hands of the executor, otherwise the court cannot render judgment upon the verdict.
If the defendant below marries after the judgment, and before the service of the writ of error, the service of the citation upon the husband is sufficient.

ERROR to the circuit court for the District of Columbia, in an action of *assumpsit* brought by the defendant in error against the plaintiff in error, as executor.

Upon the issues of *non assumpsit* and *plene administravit*, the jury found a general verdict, which was recorded in this form: "We of the jury find the issues for the plaintiff, and assess the damages to two hundred and twenty dollars and ninety-five cents." Upon which verdict the court gave judgment against the defendant *de bonis propriis*, for the damages and costs.

The error relied upon by the plaintiff in error was, that the jury had not found the amount of assets in his hands to be administered.

Swann, for plaintiff in error.

E. J. Lee, for defendant in error.

[* 20] * MARSHALL, C. J., delivered the opinion of the court to the following effect:

[*21] *The verdict ought to have found the amount of the assets in the hands of the defendant to be administered.

The cases cited to show that the judgment must be for the whole sum, if the verdict find any assets, have been overruled. This is declared by Lord Mansfield, in a case cited in Gwillim's edition of Bac. Abr. and the law is now well understood to be, that the executor is only liable for the amount of assets found by the jury. In Virginia the law has been so settled. The case cited from 2 Wash. Rep. 301, Booth's Executors *v.* Armstrong, is precisely in point. The counsel for the defendant in error attempted to show a distinction arising from the difference of form in which the verdicts were rendered. But the two verdicts appear to the court to be precisely alike in substance.

The defendant in error relies on the form of the issue. She contends that as the replication alleges that the defendant has assets more than sufficient to satisfy the debt, the finding of that issue for the plaintiff below, is in effect finding that the defendant has assets more than sufficient to satisfy the debt; and if so, it is wholy immaterial what the real amount of assets is. But if this were the issue, and the demand were $500, if the jury should find that the defendant had assets to the amount of $499, the judgment must be for the defendant.

But the law is not so. An executor is liable for the amount of assets in his hands, and not more.

The issue really is, whether the defendant has any, and what amount of assets in his hands.

Judgment reversed.[1]

8 W. 675; 14 P. 166.

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[1] *E. J. Lee* had previously moved this court to quash the writ of error, because the citation was not served on Ann Fairfax, the defendant in error; but on her husband Charles I. Catlett, with whom she had intermarried since the judgment below.

But the court overruled the motion, saying,

That the act of Congress, vol. 1, p. 62, s. 22, (1 Stats. at Large, 14,) does not designate the person upon whom the citation shall be served, but only directs that the adverse party shall have at least thirty days' notice.

The citation served on the husband is well. The service is sufficient.

*M'Keen v. Delancy's Lessee. [*22]

5 C. 22.

In construing a statute of a State concerning lands, this court adopts the construction settled in the state courts, though not in accordance with its own opinion.

A judge of the supreme court of Pennsylvania, is competent to take an acknowledgment of a deed of lands under the statute of 1715 of that State.

If the deed convey lands in two counties, recording it in one of them, is sufficient under that statute.

Error to the circuit court of the United States for the district of Pennsylvania, in an action of ejectment. The question upon the record was, whether an exemplified copy of a deed of lands, lying in two counties, acknowledged before one of the justices of the supreme court of Pennsylvania, and recorded in one of those counties, was rightly admitted in evidence concerning the title to the lands in the county where the deed was not recorded; and this depended upon the question whether the deed was duly acknowledged and recorded.

Rodney, (attorney-general,) and *Ingersoll*, for the plaintiff.

Lewis, for the defendant.

*Marshall, C. J., delivered the opinion of the court as [*31] follows, namely:

This case depends entirely on the acts of the legislature of Pennsylvania, respecting the registering of deeds.

The law of Pennsylvania, on this subject, had varied at different times; but as it stood in 1715, when the act passed which must decide this controversy, the recording of a deed was not necessary to its validity; but deeds might be enrolled, and an exemplification was testimony in all courts.

The act of 1715 established an office of record in *each [*32] county in which deeds were to be recorded, and declared an exemplification from the record to be as good evidence as the original. This act, however, does not make the recording of a deed essential to its validity.

To entitle a deed to be recorded, the act requires that it shall be acknowledged or proved "before one of the justices of the peace of the proper county or city where the lands lie."

In this case the lands lie in different counties; and the deed was

acknowledged before John Lawrence, one of the justices of the supreme court of Pennsylvania; and was recorded in the office for the city and county of Philadelphia, in which a part of the lands lie. The land, however, for which this suit was brought, lies in a different county.

The first question which presents itself in this cause is, was this deed properly proved?

Were this act of 1715 now, for the first time, to be construed, the opinion of this court would certainly be, that the deed was not regularly proved. A justice of the supreme court would not be deemed a justice of the county, and the decision would be, that the deed was not properly proved, and therefore not legally recorded.

But, in construing the statutes of a State, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the State; and in this case, the court cannot doubt that the courts of Pennsylvania consider a justice of the supreme court as within the description of the act.

It is of some weight that this deed was acknowledged by the chief justice, who certainly must have been acquainted with the construction given to the act, and that the acknowledgment was taken before another judge of the supreme court. It is also recol-
[*33] lected *that the gentlemen of the bar, who supported the conveyance, spoke positively as to the universal understanding of the State, on this point, and that those who controverted the usage on other points, did not controvert it on this. But what is decisive with the court is, that the judge who presides in the circuit court for the district of Pennsylvania, reports to us that this construction was universally received.

On this evidence the court yields the construction which would be put on the words of the act, to that which the courts of the State have put on it, and on which many titles may probably depend.

The next question is, was this deed recorded in such an office as to make the exemplification evidence?

Without reviewing all the arguments which have been urged from the bar, or all the sections of the act, it may be sufficient to observe, that this court is satisfied that, where a single tract of land is conveyed, the law requires the deed to be recorded in the office of the county in which the land lies; but if several tracts be conveyed, it appears to this court that neither the letter nor the spirit of the act requires that the deed should be recorded in each county.

It is material in the construction of this act, that the validity of the deed is not affected by omitting to record it. Though not recorded, it is still binding to every intent and purpose whatsoever.

The only legal effect produced by recording it is its preservation, by making a copy equal to the original. The principal motive, then, for requiring that it should be proved before a justice of the particular county in which the land lies, and recorded in that county, is that which has been assigned at the bar. It is the additional security given by those provisions, that a deed, never executed, might not be imposed on the recorder. This object is as completely obtained by placing the deed on the records of that county in which *one of the tracts of land lies, as it could be if the deed conveyed no other tract. The verity of the deed is as completely secured in the one case as in the other. [*34]

It appears to the court also to be within the letter of the law. This deed was unquestionably properly admitted to record in the office of the city and county of Philadelphia. It conveyed lands lying within that city and county, and on any construction of the act, might be there recorded. The act then proceeds to say, "that the copies of all deeds, so enrolled, shall be allowed in all courts where produced, and are hereby declared and enacted to be as good evidence, and as valid and effectual in law, as the original deeds themselves."

The whole deed, then, is evidence by the letter of the act. The whole is a copy from the record. If the validity of the conveyance depended on its being recorded in the county where the land lies, then a deed might be good as to one tract, and bad as to another. But the deed is valid, though not recorded; and the question is, whether the copy is evidence as to every thing it contains. The execution of the deed is one entire thing, and is proved so as to admit the instrument to record. The copy, if true in part, is true in the whole; and if evidence in part, must, under the act, and on the general principle that it is the copy of a record, be evidence in the whole.

There is no error in the judgment of the circuit court; and it is affirmed with costs.

12 W. 153; 6 P. 291, 691; 4 H. 37; 14 H. 488.

JOHN AND JAMES TUCKER *v.* OXLEY, Assignee of T. MOORE, a Bankrupt.

5 C. 34.

Under the Bankrupt Act, (2 Stats. at Large, 19,) a debt due from a firm, of which the bankrupt was a member, dissolved before the bankruptcy, may be set off against a debt due to the bankrupt alone, in an action by his assignee.

ERROR to the circuit court for the District of Columbia.
The material facts are stated in the opinion of the court.

C. Simms, for the plaintiff.

Jones, for the defendant.

[* 39] *MARSHALL, C. J., delivered the opinion of the court, as follows:

In this case the plaintiffs in error, who were defendants in the circuit court, claimed to set off against a debt due from them to Thomas Moore, the bankrupt, a debt previously due to them from the firm of H. and T. Moore, which firm was dissolved, and the partnership fund had passed to T. Moore. This offset was not allowed; and its rejection is the error alleged in the proceedings of the circuit court.

At law, independent of the statute of bankruptcy, the court is of opinion that this discount could not have been made in a suit instituted by Thomas Moore against the Tuckers; and if the words of the act of congress allowing set-off in the case of mutual debts and credits were to be expounded without regard to the provisions of that act in other respects, it is probable they would not be extended beyond that technical operation to which has been

[* 40] *allowed the term "mutual debts," in ordinary cases. But the bankrupt law changes essentially the relative situation of the parties; and the provisions making that change are thought, by a majority of the court, to have a material influence on the words of the 42d section of the act, which provide for the case of mutual debts and credits.

It is the opinion of the court that this is a debt, which might have been proved under the 6th section of the act. It is a debt, which, by a suit against both the partners, might have been recovered against either of them, and either might have been compelled to pay the whole. Although due from the company, yet it is also due from each member of the company; and the claim of the creditor for its satisfaction extended, previous to the act of bankruptcy, to the whole property of each member of the firm, as well as to the joint property of the firm. It would be certainly impairing that claim to apply, by the operation of law, the whole particular fund to other creditors, who, at the time of the bankruptcy, had not a better legal claim on that fund than the Tuckers, without allowing them to participate in it. The court, therefore, would be much inclined to consider the creditors of the partnership as having a right, under the general de-

scription of creditors of the bankrupt, to prove their debts before the commissioners. But all doubt on this subject seems to be removed by the proviso to the 34th section. That section declares, that the bankrupt shall be discharged from all debts which were due from him at the date of the bankruptcy, and all which were or might have been proved under the said commission, "Provided that no such discharge of a bankrupt shall release or discharge any person, who was a partner with such bankrupt at the time he or she became bankrupt, or who was then jointly held or bound with such bankrupt for the same debt or debts, from which such bankrupt was discharged as aforesaid."

Thomas Moore, then, is discharged from the debt due from Henry and Thomas Moore to the Tuckers; and if he is discharged therefrom, it would seem to *be an infraction of their pre- [* 41] existing rights not to allow them a share of his property.

It is deemed by the court material in the construction of this statute, that, as the proviso shows the joint creditors to be within the description of the terms of creditors of the bankrupt, so as to enable them to prove their debts under the commission, they are of necessity comprehended within the same terms in those sections which direct to whom the dividends are to be made. The words of the 29th and 30th sections are imperative. They command the commissioners to divide the estate of the bankrupt among such of his creditors as shall have made due proof of their debts, in proportion to the amount of their claims. Consequently, every creditor who proves his debt is entitled to a dividend.

But, although the creditors of H. and T. Moore might have proved their debt before the commissioners, and have received a dividend out of the estate of the bankrupt, it may be contended that, having failed to do so, they are not entitled to set off their whole claim.

The 42d section of the act directs, that where it shall appear to the commissioners that there hath been mutual credit given by the bankrupt and any other person, or mutual debts between them at any time before such person became bankrupt, the assignee or assignees of the estate shall state the account between them, and one debt may be set off against the other; and what shall appear to be due on either side, on the balance of such account, after such set-off, and no more, shall be claimed or paid on either side respectively.

The term "debt," as used in this section, is fairly to be construed to mean any debt for which the act provides. A debt which may be proved before the commissioners, and to the owner of which a dividend must be paid, is a debt in the sense of the term as used in this section.

[* 42] *Were this doubtful, it cannot be denied that the advantage given by the section is reciprocal, and in any case where the set-off would be allowed, if the balance was against the bankrupt, it must be allowed in his favor. It has already been stated that the Tuckers might have proved their claim before the commissioners. Can it be doubted that the whole of the debt due to the bankrupt would, under this section, have been deducted from that claim? We think it cannot be doubted. Then, the terms applying alike to each party, the debt due to the Tuckers must be set off from that which they owe the bankrupt.

If the "assignee of the estate ought to have stated the account," and have only claimed the balance, his omitting so to do cannot enlarge his rights; he can only recover what he ought to have claimed.

This, which seems to be the naked law of the case, is not unreasonable. It is fair to conclude that the Tuckers forbore to recover the money due to them from H. and T. Moore, in consideration of their dealings with T. Moore, after he traded on his separate account.

This exposition of the bankrupt act appears to the court to conform to that which is given in England. As the bankrupt law of the United States, so far as respects this case, is almost, if not completely, copied from that of England, the decisions which have been made on that law by the English judges may be considered as having been adopted with the text they expounded.

In England, it has never been doubted that a man, having a claim on two persons, might become a petitioning creditor for the bankruptcy of one of them. Such petitioning creditor has always been admitted to prove his debt before the commissioners, and to receive his dividends, in proportion, with the other creditors. He is, then, in contemplation of the act, a creditor of the bankrupt; and, [* 43] consequently, all the *provisions of the act apply to him, as to other creditors. This would seem to prove that, under the legal operation of the act, a creditor of a firm, of which the bankrupt was one, and a creditor of the bankrupt singly, were equally creditors of the bankrupt, in contemplation of the law, and were construed to come equally within the meaning of the term, as used in the act. If this position be correct, the rules which we find laid down by the chancellor, for marshalling the respective funds, are to be considered merely as equitable restraints on the legal rights of parties, obliging them to exercise those rights in such manner as not to do injustice to others. This is the peculiar province of a court of chancery. It is the same, in principle, with the common case of marshalling assets, where specialty creditors, who have a right to satisfaction

out of lands, exhausts the personal estate, to the injury of simple contract creditors.

It is undoubtedly unjust that the Tuckers, having a claim on H. and T. Moore, and being able to obtain payment from H. Moore, should satisfy that claim entirely out of the separate estate of T. Moore, to the exclusion of other creditors, who had no resort to Henry; and it is probable that a court of chancery might restrain this use of his legal rights within equitable limits. But suppose H. Moore, also, to be a bankrupt; or to be insolvent, and unable to pay the debt; would it not be equally unjust to apply the estate of each individual to the discharge of the several debts, to the entire exclusion of their joint creditors, who, previous to their bankruptcy, had a legal and equitable right to satisfaction out of the separate estate of each?

Mr. Cooke has made a very good collection of the decisions in England on this question. It will be found that a creditor of the partnership was first permitted by consent to prove his debt before the commissioners of the individual bankrupt, and to receive dividends from the separate fund. It was afterwards decided by the chancellor that he had a right *so to do; and in con- [* 44] formity with this decision was the regular course of the court, until the year 1796. During this time, however, the chancellor, sitting as chancellor, on a bill suggesting equitable considerations for restraining the order he had made, was accustomed to enjoin the dividends which he had ordered, sitting in bankruptcy. This would seem to prove that, at law, the creditor of the partnership had a right to his dividends from the separate fund, but that equity would compel him first to exhaust the joint fund.

In 1796, this whole subject was reviewed in the case *Ex parte* Elton, reported in 3 Ves. jun, 238. This case has been considered as overruling former decisions; but, in the opinion of the court, it confirms the principle already stated. After stating his objecion tot the prevailing practice, because each order carried in its bosom a suit in chancery, the chancellor took time to consider the subject; and finally determined that the petitioner should be permitted to prove his debt, and that his dividend should be set apart, but not paid to him until an account should be taken of the joint fund.

It is perfectly clear that, in this case, the chancellor, for convenience, exercised, at the same time, his common law and equitable jurisdiction. In conformity with the uniform exposition of the act, he permitted the partnership creditor to prove his debt before the commissioners of the bankrupt, and directed the dividend to be allotted to him out of the separate fund; and then, without the expense

of a bill, exercising his equitable powers, he suspended the payment of this dividend, until it should be ascertained how much of it a court of equity would permit a creditor to receive. This does not negative, but affirms, the legal right of a partnership creditor to come on the separate fund.

It appears also to be admitted, that if the particular creditors should be satisfied without exhausting the fund, the residue [* 45] might be paid to the partnership *creditors. This seems to admit the legal right of those creditors to prove their debts, and to receive their dividends. It is equity, not law, which can postpone them.

It is the opinion of a majority of the court, that the circuit court erred in rendering a judgment on this special verdict for the sum of $143.33, instead of the sum of $16.63; which was the balance after deducting the debt due from H. & T. Moore to the defendants in that court. It is therefore considered by the court, that the said judgment be reversed and annulled; and that judgment be rendered for the plaintiffs in the circuit court for the sum of $16.63, and the costs in the circuit court.

Judgment reversed.

16 P. 291; 8 H. 414.

YOUNG *v.* THE BANK OF ALEXANDRIA.

5 C. 45.

The act incorporating the Bank of Alexandria provided that in suits brought by the bank, upon notes made negotiable therein, an issue should be made up, and a trial had at the return term of the writ. The appearance day in Virginia for all process was the day after the term. *Held*, that in such a suit the court below might rule the defendant below to a trial at the return term.

Youngs, for the plaintiff.

Simms and *Swann*, for the defendant.

[* 49] *MARSHALL, C. J., delivered the opinion of the court, to the following effect:

The writ being returnable to the court, is returnable the first day of the court. It was known to the legislature of Virginia, that the appearance day for all process was the day after the term. When,

therefore, they directed that a trial should be had at the return term, they must have intended that this case should be an exception to the general rule.

Judgment affirmed.

5 C. 49.

YEATON v. THE BANK OF ALEXANDRIA.

5 C. 49.

An accommodation indorsor of a note negotiable in the Bank of Alexandria, is by force of the act of incorporation, liable to an action before the maker has been sued, and though he be solvent.

ERROR to the circuit court for the District of Columbia. The question, and the material facts, are stated in the opinion of the court.

Youngs, for the plaintiff.

Swann, for the defendant.

* MARSHALL, C. J., delivered the opinion of the court as [* 51] follows, namely:

The question in this case is, whether the indorser of a note negotiable in the Bank of Alexandria, if such indorsement be for accommodation, may be sued by the bank, before a suit shall be instituted against the maker, if the maker be solvent.

In Virginia, the indorser of a promissory note was not, when the town of Alexandria was separated from that State, liable to the holder by any express statute. He was only liable under the implied contract created by his indorsement. This implied contract, by the general understanding of the country, was, that he would pay the debt, if by due diligence it could not be obtained from the maker. This condition, however, was not expressed. * Yet [* 52] it was just, because it was consistent with general usage, and, therefore, was the real understanding with which such an indorsement was made and received.

But in banks, this is probably not the usage; and if it be not,

then the same reason does not exist for annexing such a condition to the contract created by indorsement. If banks are understood to receive notes made negotiable with them, as subject to the law which governs inland bills of exchange, then it would seem reasonable, in the case of notes actually negotiated with them, to imply, from the act of indorsement, an undertaking conformable to that usage. If, then, the case showed that such was the usage of the bank, and such the understanding under which notes were discounted, this court is not prepared to say that the undertaking created by the indorsement would not be so fashioned as to give effect to the real intention of the parties.

But the incorporating act removes any doubt which might otherwise exist on this point.

The 20th section of that act declares, "that whenever any person or persons indebted to the said bank on bonds, bills, or notes, given or indorsed by them, with an express consent, in writing, that they may be negotiable at the said bank, and shall refuse or neglect to make payment at the time the same may become due, and a suit shall thereupon be commenced, &c., judgment is to be rendered in a summary manner.

A person, then, may become indebted to the bank on a note indorsed by him, as well as on a note made by him; and the question is, when does he become indebted. The act appears to answer this question in the succeeding member of the sentence. The words are, "and shall refuse or neglect to make payment at the time the same may become due." To what antecedent does the word, "same" refer? Most obviously to the words "bond, bill, [* 53] or note." When the bond, bill, or note becomes * due, the maker or indorser, who shall refuse or neglect to make payment, is within the description of the act. No man can be said to refuse or neglect to make payment, before the money is demandable from him, and till then no action can be brought. But the law proceeds to say, "and a suit shall thereupon be commenced." The word "thereupon" must refer to the note, or to the circumstances previously stated. Give it the one meaning or the other, and the law obviously contemplates a suit against the maker or indorser, on his refusing or neglecting to pay such note, when it shall become due. The act then proceeds to say, that, when this suit shall be so commenced, the court shall render judgment thereon in a summary way.

It is alleged that the preceding part of the section is all recital, and cannot, therefore, be construed to give a right to sue, where that right did not before exist; that the enacting clause gives no remedy where

one did not before exist; but substitutes a summary mode of proceeding, for that more tedious action which the previous laws had given.

It is true that the first part of this section is recital; but it describes the precise case in which judgment shall be rendered in a summary way. That precise case is, where a person indebted, by making or indorsing a note negotiable and negotiated in the bank, shall refuse or neglect to make payment thereof, when such note shall become due. The time when he becomes indebted is declared to be, when the note becomes due.

It is alleged that an accommodation indorsor cannot then become indebted. This distinction was completely overruled in the case of Violet and Patton. The consideration moving from the bank to the maker of the note, on the credit of the indorsor, charges both the maker and the indorsor. The indorsor is, in this respect, as liable, both in reason and in law, to the claim of the bank, as if he had placed his name on the face instead of the back of the note.

Judgment affirmed, with costs.

*JOHNSON, J. Both the questions,[1] argued in this case [*54] arise out of the act of Virginia incorporating the Bank of Alexandria.

On the point of the summary jurisdiction, I concur with my brethren, and think this opinion perfectly consistent with the decision, at the last term, relative to the right of appeal. I remember that my opinion in that case was founded on the idea that the provisions of that act, relative to the summary recovery of debts, was entirely a judicial regulation. That the judicial power was unalienable from the sovereignty of a country, and must therefore, in all its modifications, remain subject to the will of succeeding legislatures. That it was, in fact, a subject in which a peculiar, indefeasible right could not be vested in an individual. I thought it, therefore, from its nature, unaffected by the clause of the act of acceptance reserving to the bank its corporate rights, and of course affected by the law which gives an appeal, generally, from the courts of this district to the supreme court above a certain amount. I have no doubt of the power of congress to deprive them also of their summary remedy; but it has not yet legislated to that effect.

[1] This case was argued in connection with that of Young v. The Bank of Alexandria, as one case. This opinion therefore, applies to both cases.

On the other question, I entertain a very strong opinion in opposition to that of the court.

The doctrine has been repeatedly sanctioned in this court, that, in the State of Virginia, the holder of a promissory note cannot recover against an indorsor without proving the insolvency of the drawer. But it is contended that the act, incorporating this bank, has placed the notes negotiable therein on a different footing; and that an indorser of such a note may be sued as soon as it is dishonored, without any evidence of the insolvency of the drawer. The following are the words of the clause, so far as they are material to this case:

[*55] "And whereas it is *absolutely necessary that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them, be it enacted, that whenever any person or persons indebted to the said bank on bonds, bills, or notes, given or indorsed by them, with an express consent in writing that they may be negotiable at the said bank, and shall refuse or neglect to make payment at the time the same may become due, and a suit shall be thereupon commenced against such defaulter, and a *capias ad respondendum* returned and executed, or a copy left at the usual place of residence of such defaulter, at least ten days before the return day of such writ, the court shall," &c. It then goes on and enacts, that in such case, "the court shall order the proceedings to be made up, and the cause tried at the first court." This bare recital, or preamble, without one enacting word, is what is supposed to have effected this important change in the law of Virginia, relative to the liability of an indorsor. Much stress was laid, in the argument, upon the use of the word "indebted," as applied to the indorsor, the words "negotiable at the said bank," and words which suppose the commencement of a suit, as soon as a note "becomes due." I positively deny the correctness of maintaining any repeal or alteration in the principle of a law, upon an implication drawn from a mere preamble or recital to an act. Enacting words will undoubtedly often produce a repeal by implication, but a recital or preamble sets forth merely the motives or inducements of the legislator, and, whether founded in error or truth, serves no other purpose than to justify him to those for whom he is legislating, or, at times, to assist in developing the meaning of doubtful enacting words. Admit the principle, that a preamble may have the effect of enacting words, and there is no necessity for dilating on the inextricable absurdities in which a court may be involved. In the case before us, it is possible that the legislature may have supposed that the law of Virginia would sanction an immediate suit against the indorsor,

without evidence of the drawer's insolvency; *but their [*56] courts of justice have decided otherwise; and it would be singular if an erroneous opinion, entertained by that body, should have all the effects of a law passed by it. But there is not a word contained in this preamble which may not be fully satisfied, without producing any necessary implication against the general law of Virginia, relative to the liability of the indorsor.

When the legislature speaks of a person indebted by indorsement, it can only be understood to speak of one indebted according to the legal liability of an indorsor; which is only, by the laws of Virginia, in case of the insolvency of the drawer.

When it speaks of a consent in writing, that it may be negotiable at the said bank, it can only mean what it expresses; and intends it for the purpose of subjecting the individual to the summary recovery given in such a case; for, as to his general liability as indorsor, such a consent was in nowise necessary; that liability existed in its full extent without it.

And as to the supposition of the indorsor's liability to be sued when the note becomes due, this also is strictly and literally true, if the drawer should then be insolvent, or (I suppose) if he should become so at any time before the trial of the issue.

Upon the whole, therefore, it appears to me that there is no possible difference between the liability of an indorsor generally, and an indorsor of a note negotiable in the Bank of Alexandria; that the legislature intended to make no distinction; and, if it had expressly declared such to be its intent, no such change would have been produced, without following up that intention with sufficient enacting words; but that in fact, its sole object was to do that which it professes to intend, and alone has effected, namely, to give a summary remedy against all persons becoming indebted to that bank, whenever their legal liability is incurred. In fact it may, with the utmost correctness, *be affirmed of an indorsor that he [*57] is indebted, and that he may be sued when the note becomes due, without at all interfering with the laws of Virginia on this subject; for a thing may be *debitum in presenti*, and yet no cause of action exist against him; he may lie under a present obligation to pay a sum of money, upon some contingency or future event. And, with regard to his liability to be sued when the note becomes due, it may be very correctly affirmed that it is not due from him until the insolvency of the drawer can be shown. As to the drawer, the note is due when it is made payable; but the principles of the Virginia law add a contingency to the liability of the indorsor, so that, in fact, his undertaking is collateral and contingent, and the

amount is not legally due from him until after the day of payment, and provided the drawer should prove insolvent.

9 W. 581; 3 H. 515.

[* 61] *THE BANK OF THE UNITED STATES *v.* DEVEAUX et al.

5 C. 61.

The charter of the Bank of the United States does not enable that bank to sue in the courts of the United States.

The capacity of a corporation aggregate to sue in those courts depends upon the citizenship of its members.

ERROR to the circuit court of the United States for the district of Georgia, in an action by "The President, Directors & Company of the Bank of the United States, which bank was established under an act of congress entitled," &c. The record contained an averment that the plaintiffs "are citizens of the State of Pennsylvania, and the said Deveaux & Robinson are citizens of the State of Georgia." The defendants pleaded to the jurisdiction, that the body corporate which brought the action was not competent to sue in the circuit court of the United States. The plaintiffs demurred, and judgment was given for the defendants.

Binney, *Harper*, and *Ingersoll*, for the plaintiffs.

P. B. Key, and *Jones*, for the defendants.

[* 84] *MARSHALL, C. J., delivered the opinion of the court, as follows:

Two points have been made in this cause.

[* 85] 1. That a corporation, composed of citizens of *one State may sue a citizen of another State, in the federal courts.

2. That a right to sue in those courts is conferred on this bank by the law which incorporates it.

The last point will be first considered.

The judicial power of the United States, as defined in the constitution, is dependent, 1st. On the nature of the case; and 2d. On the character of the parties.

By the Judicial Act,[1] the jurisdiction of the circuit courts is extended to cases where the constitutional right to plead and be impleaded, in the courts of the Union, depends on the character of the parties; but

[1] 1 Stats. at Large, 73.

where that right depends on the nature of the case, the circuit courts derive no jurisdiction from that act, except in the single case of a controversy between citizens of the same State, claiming lands under grants from different States.

Unless, then, jurisdiction over this cause has been given to the circuit court by some other than the Judicial Act, the Bank of the United States had not a right to sue in that court, upon the principle that the case arises under a law of the United States.

The plaintiffs contend that the incorporating act confers this jurisdiction.

That act creates the corporation, gives it a capacity to make contracts and to acquire property, and enables it "to sue and be sued, plead and be impleaded, answer and be answered, defend and be defended, in courts of record, or any other place whatsoever."

This power, if not incident to a corporation, is conferred by every incorporating act, and is not understood to enlarge the jurisdiction of any particular court, but to give a capacity to the corporation to *appear, as a corporation, in any court which [* 86] would, by law, have cognizance of the cause, if brought by individuals. If jurisdiction is given by this clause to the federal courts, it is equally given to all courts having original jurisdiction, and for all sums however small they may be.

But the 9th article of the 7th section of the act[1] furnishes a conclusive argument against the construction for which the plaintiffs contend. That section subjects the president and directors, in their individual capacity, to the suit of any person aggrieved by their putting into circulation more notes than is permitted by law, and expressly authorizes the bringing of that action in the federal or State courts.

This evinces the opinion of congress, that the right to sue does not imply a right to sue in the courts of the Union, unless it be expressed. This idea is strengthened also by the law respecting patent rights. That law expressly recognizes the right of the patentee to sue in the circuit courts of the United States.

The court, then, is of opinion, that no right is conferred on the bank, by the act of incorporation, to sue in the federal courts.

2. The other point is one of much more difficulty.

The jurisdiction of this court being limited, so far as respects the character of the parties in this particular case, "to controversies between citizens of different States," both parties must be citizens, to come within the description.

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[1] 1 Stats. at Large, 194.

That invisible, intangible, and artificial being, that mere legal entity, a corporation aggregate, is certainly not a citizen; and, consequently, cannot sue or be sued in the courts of the United States, unless the rights of the members, in this respect, can be
[* 87] exercised in their corporate name. If the corporation * be considered as a mere faculty, and not as a company of individuals, who, in transacting their joint concerns, may use a legal name, they must be excluded from the courts of the Union.

The duties of this court, to exercise jurisdiction where it is conferred, and not to usurp it where it is not conferred, are of equal obligation. The constitution, therefore, and the law, are to be expounded, without a leaning the one way or the other, according to those general principles which usually govern in the construction of fundamental or other laws.

A constitution, from its nature, deals in generals, not in detail. Its framers cannot perceive minute distinctions which arise in the progress of the nation, and therefore confine it to the establishment of broad and general principles.

The judicial department was introduced into the American constitution under impressions, and with views, which are too apparent not to be perceived by all. However true the fact may be, that the tribunals of the States will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different States. Aliens, or citizens of different States, are not less susceptible of these apprehensions, nor can they be supposed to be less the objects of constitutional provisions, because they are allowed to sue by a corporate name. That name, indeed, cannot be an alien or a citizen; but the persons whom it represents may be the one or the other; and the controversy is, in fact and in law, between those persons suing in their corporate character, by their corporate name, for a corporate right, and the individual against whom the
[* 88] suit may be instituted. Substantially * and essentially, the parties in such a case, where the members of the corporation are aliens, or citizens of a different State from the opposite party, come within the spirit and terms of the jurisdiction conferred by the constitution on the national tribunals.

Such has been the universal understanding on the subject. Repeatedly has this court decided causes between a corporation and an individual without feeling a doubt respecting its jurisdiction. Those

decisions are not cited as authority; for they were made without considering this particular point; but they have much weight, as they show that this point neither occurred to the bar or the bench; and that the common understanding of intelligent men is in favor of the right of incorporated aliens, or citizens of a different State from the defendant, to sue in the national courts. It is by a course of acute, metaphysical and abstruse reasoning, which has been most ably employed on this occasion, that this opinion is shaken.

As our ideas of a corporation, its privileges and its disabilities, are derived entirely from the English books, we resort to them for aid, in ascertaining its character. It is defined as a mere creature of the law, invisible, intangible, and incorporeal. Yet, when we examine the subject further, we find that corporations have been included within terms of description appropriated to real persons.

The statute of Henry VIII., concerning bridges and highways, enacts, that bridges and highways shall be made and repaired by the "inhabitants of the city, shire, or riding," and that the justices shall have power to tax every "inhabitant of such city," &c., and that the collectors may "distrain every such inhabitant as shall be taxed and refuse payment thereof, in his lands, goods and chattels."

Under this statute those have been construed inhabitants who hold lands within the city where the * bridge to be re- [* 89] paired lies, although they reside elsewhere.

Lord Coke says, "every corporation and body politic residing in any county, riding, city, or town corporate, or having lands or tenements in any shire, *quæ propriis manibus et sumptibus possident et habent*, are said to be inhabitants there, within the purview of this statute."

The tax is not imposed on the person, whether he be a member of the corporation or not, who may happen to reside on the lands; but is imposed on the corporation itself, and, consequently, this ideal existence is considered as an inhabitant, when the general spirit and purpose of the law requires it.

In the case of The King *v.* Gardner, reported by Cowper, 79, a corporation was decided, by the court of king's bench, to come within the description of "occupiers or inhabitants." In that case the poor rates, to which the lands of the corporation were declared to be liable, were not assessed to the actual occupant, for there was none, but to the corporation. And the principle established by the case appears to be, that the poor rates, on vacant ground belonging to a corporation, may be assessed to the corporation, as being inhabitants or occupiers of that ground. In this case Lord Mansfield notices and overrules an inconsiderate *dictum* of Justice Yates, that a corporation could not be an inhabitant or occupier.

These opinions are not precisely in point; but they serve to show that, for the general purposes and objects of a law, this invisible, incorporeal creature of the law may be considered as having corporeal qualities.

It is true that as far as these cases go they serve to show that the corporation itself, in its incorporeal character, may be considered as an inhabitant or an occupier; and the argument from them would be more strong in favor of considering the corporation
[*90] *itself as endowed for this special purpose with the character of a citizen, than to consider the character of the individuals who compose it as a subject which the court can inspect, when they use the name of the corporation, for the purpose of asserting their corporate rights. Still the cases show that this technical definition of a corporation does not uniformly circumscribe its capacities, but that courts, for legitimate purposes will contemplate it more substantially.

There is a case, however, reported in 12 Mod. 669, which is thought precisely in point. The corporation of London brought a suit against Wood, by their corporate name, in the mayor's court. The suit was brought by the mayor and commonalty, and was tried before the mayor and aldermen. The judgment rendered in this cause was brought before the court of king's bench and reversed, because the court was deprived of its jurisdiction by the character of the individuals who were members of the corporation.

In that case the objection, that a corporation was an invisible, intangible thing, a mere incorporeal legal entity, in which the characters of the individuals who composed it were completely merged, was urged and was considered. The judges unanimously declared that they could look beyond the corporate name, and notice the character of the individual. In the opinions, which were delivered *seriatim*, several cases are put which serve to illustrate the principle, and fortify the decision.

The case of The Mayor and Commonalty *v.* Wood, is the stronger because it is on the point of jurisdiction. It appears to the court to be a full authority for the case now under consideration. It seems not possible to distinguish them from each other.

If, then, the congress of the United States had, in terms
[*91] enacted that incorporated aliens might sue *a citizen, or that the incorporated citizens of one State might sue a citizen of another State, in the federal courts, by its corporate name, this court would not have felt itself justified in declaring that such a law transcended the constitution.

The controversy is substantially between aliens, suing by a corpo-

rate name, and a citizen, or between citizens of one State, suing by a corporate name, and those of another State. When these are said to be substantially the parties to the controversy, the court does not mean to liken it to the case of a trustee. A trustee is a real person capable of being a citizen or an alien, who has the whole legal estate in himself. At law, he is the real proprietor, and he represents himself, and sues in his own right. But in this case the corporate name represents persons who are members of the corporation.

If the constitution would authorize congress to give the courts of the Union jurisdiction in this case, in consequence of the character of the members of the corporation, then the Judicial Act ought to be construed to give it. For the term citizen ought to be understood as it is used in the constitution, and as it is used in other laws. That is, to describe the real persons who come into court, in this case, under their corporate name.

That corporations composed of citizens are considered by the legislature as citizens, under certain circumstances, is to be strongly inferred from the Registering Act. It never could be intended that an American registered vessel, abandoned to an insurance company composed of citizens, should lose her character as an American vessel; and yet this would be the consequence of declaring that the members of the corporation were, to every intent and purpose, out of view, and merged in the corporation.

The court feels itself authorized by the case in 12 Mod., (on a question of jurisdiction,) to look to * the character of [*92] the individuals who compose the corporation, and they think that the precedents of this court, though they were not decisions on argument, ought not to be absolutely disregarded.

If a corporation may sue in the courts of the Union, the court is of opinion that the averment in this case is sufficient.

Being authorized to sue in their corporate name, they could make the averment, and it must apply to the plaintiffs as individuals, because it could not be true as applied to the corporation.

Judgment reversed; plea in abatement overruled, and cause remanded.

LIVINGSTON, J., having an interest in the question, gave no opinion.

5 C. 57; 8 W. 464; 9 W. 738, 904; 5 P. 479; 13 P. 519; 14 P. 60; 2 H. 497; 14 H. 80; 15 H. 233; 16 H. 314; 18 H. 331, 480.

Hope Insurance Company of Providence v. Boardman et al.

5 C. 57.

Whether a corporation aggregate can be sued in the courts of the United States depends upon the citizenship of its members.

Error to the circuit court of the United States for the district of Rhode Island. The record described the plaintiffs below as citizens of the State of Massachusetts, and the defendants as a corporation created by the legislature of Rhode Island.

Ingersoll, for the plaintiffs.

Adams, for the defendants.

[* 61] * The Court having, in the case of The Bank of the United States *v.* Devereux et al., decided that the right of a corporation to litigate in the courts of the United States depended upon the character (as to citizenship) of the members which compose the body corporate, and that a body corporate as such cannot be a citizen, within the meaning of the constitution, reversed the judgment, for want of jurisdiction in the court below.

2 H. 9; 18 H. 381.

[*92] * Matthews *v.* Zane's Lessee.

5 C. 92.

The question in this case was, whether lands lying within the limits of the Zanesville land district, created by the act of March 3, 1803, (2 Stats. at Large, 237, s. 6,) could be sold at the Marietta land office, after the passage of that act.

P. B. Key, for the plaintiff.

Harper, for the defendant.

*MARSHALL, C. J., stated the opinion of the court to be, [*99] that the decision of the court below was correct; that the erection of the Zaneville district suspended the power of sale in the Marietta district.

Judgment affirmed.

7 W. 164; 9 H. 421.

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*HODGSON *v.* THE MARINE INSURANCE COMPANY OF [*100] ALEXANDRIA.

5 C. 100.

If insurance be made for whom it may concern, undue concealment as to the parties interested cannot be alleged.

In such a case, the policy covers the property of a belligerent, unless there is an express warranty that it is neutral property.

A promissory note given for the premium, is a sufficient consideration for the contract of insurance.

A valuation, not fraudulent, is binding.

An innocent misrepresentation, not material to the risk, does not avoid the policy.

It is not necessary, in an action of covenant on a sealed policy, to aver an abandonment in the declaration

ERROR to the circuit court for the District of Columbia, in an action of covenant on a policy of insurance, whereby the defendants caused Hodgson, for George F. Straas, and others, of Richmond, as well in his own name, as for and in the name and names of all and every other person and persons, to whom the same did, might, or should appertain, in part or in all, to be insured $8,000 on the brig Hope, from St. Domingo to her port of discharge in the Chesapeake, the vessel being valued at $10,000. In one count the vessel was averred to be the property of Straas & Leeds, and in another of Leeds. The loss was by capture and condemnation. The defendants pleaded eight pleas. The first three terminated in issues of fact.

The fourth plea was, in substance, that the vessel was condemned as property of enemies of Great Britain; and that the insurance was made upon the property only of American citizens who were neutrals. To this plea there was a demurrer.

The fifth plea was, in substance, that the plaintiff, when he obtained the insurance, knew it was the practice of the defendants not to insure a vessel for more than her reasonable value; and to induce

the defendants to insure $8,000, he represented the vessel to be about 250 tons burden, and from six to seven years old. That in consequence of that representation the defendants subscribed the policy. That the vessel was less than 265 tons burden, and was more than eight and a half years old, and of the value of $3,000 only, and that they were induced to agree to the valuation of $10,000, and to insure $8,000 by these misrepresentations. To this plea there was a demurrer.

The sixth plea was like the fifth, except, it did not aver the practice of the defendants, but alleged the misrepresentation to be "material in regard to the contract of insurance." To this plea the plaintiffs replied that the difference between the true and the represented age of the vessel was not material as to her seaworthiness, or as to the risk. The rejoinder set forth the practice as to amount of insurance as in the fifth plea, and averred that the misrepresentation induced the defendants to agree to the valuation, and was material to that part of the contract. To this rejoinder there was a demurrer.

The seventh plea was, that the vessel was in part the property of a belligerent. To this plea there was a demurrer.

The eighth plea was, that the plaintiff had not paid the premium, and had obtained an injunction from a court of chancery in Virginia, to prevent its collection. To this plea there was a demurrer.

The court below gave judgment for the defendants on the sixth plea, and decided in favor of the plaintiff on the other issues.

Swann and *Jones*, for the plaintiff.

E. J. Lee and *C. Lee*, for the defendants.

[*109] * CUSHING, J., (MARSHALL, C. J., not sitting in the cause,) delivered the opinion of the court, as follows:

The insurance in this case being general, as well for the parties named as "for all and every other person or persons to whom the vessel did or might appertain," and containing no warranty of neutrality, belligerent as well as American property was covered by it. Some of the parties being described as of Richmond, does not necessarily imply that they all resided there; but if they did, mere residence would not make them citizens; and even then, an express warranty was necessary, if it had been designed to run only a neutral risk. This is an answer to the 7th as well as to the 4th plea; because there can be no undue concealment as to the parties interested, where the terms of the policy are so broad as to preclude the

necessity, either of disclosing their names, or of inserting them in the instrument.

*The 8th plea is also bad. The defendants acknowledge, [*110] under seal, to have received a consideration of seventeen and a-half per cent. for the insurance they made, which it appears was secured by a note, the amount of which was to be deducted from the sum to be paid for a loss, if any happened. On the face of the instrument, then, a valid consideration, if that be necessary, is stated, and if the note be never paid it cannot vacate the contract, or be relied on as a defence to an action on it. This court knows not why a court of equity has been applied to for an injunction. Its proceedings, therefore, can have no influence on the present suit, for notwithstanding its interposition in the way mentioned in this plea, the defendants cannot be deprived of the right they have reserved of deducting the amount of premium from whatever sum they may have to pay for the loss that has occurred.

Without deciding whether a material misrepresentation, not fraudulent, can be pleaded in avoidance of a sealed instrument, the court thinks there is no fact disclosed by either the 5th or 6th plea, which could vacate an insurance were it only a simple contract. In no part of the 5th plea is the misrepresentation alleged to be material. It is only to be inferred that it had some influence (but to what degree does not appear) in prevailing on the defendants to agree to so high a valuation. It will hardly, however, be insisted, that every overvaluation, however inconsiderable, or however innocently produced, will annul a contract of this nature. It would seem more reasonable, to let mistakes of this kind (if they are to have any operation at all) regulate the extent of recovery, and not deprive the party of his whole indemnity: for if an extravagant valuation be made, an underwriter cannot reasonably ask to be relieved beyond the excess complained of. The allegation that the vessel was worth, when insured, only $3,000, is also very unimportant, it being nowhere stated that the plaintiff represented her to be worth more, but only proposed that her value in the policy should be agreed *at $10,000. [*111] Now although she might not, in fact, have been worth this sum, it is impossible for the court to say that this difference was produced entirely by the mistake which was made in her age and tonnage. This would be to say that a difference of a year or two in the age, and of fifty or sixty tons in the burden of a vessel, must, in all cases, have the same effect on her value; a conclusion which, on investigation, would be found very incorrect. Nor, if it appeared on trial that her actual worth were no more than $3,000, would it necessarily avoid the contract, or restrict the damages to that sum; for

she may, notwithstanding, have fairly cost her owners the whole amount of her valuation; who, in that case, would have honestly represented her as worth $10,000.

But a more fatal objection to this plea is, that the misrepresentation relied on is not stated to have been material to the risk of the voyage; and yet the only cases in which policies have been avoided for innocent misrepresentations, are those in which the matter disclosed or concealed has affected the risk so as to render it different from the one understood at the time, and on which the premium was calculated.

Most of the remarks on the 5th apply also to the 6th plea: for although it be here alleged that the misrepresentation was material "in regard to the contract of insurance," it should have been stated in what particular, that it might appear whether the risk run were at all affected by it.

An objection is made to the declaration, but not much relied on, that no abandonment is averred to have been made. In covenant such averment cannot be necessary. If it be proved on the trial, it will be sufficient.

The judgment of the circuit court on the 4th, 5th, 7th, and 8th pleas must be affirmed, with costs; and its judgment in
[*112] favor of the defendants on the *6th plea reversed; and judgment on that plea be also rendered for the plaintiff.

JOHNSON, J. The difficulties in this case arise partly from the pleadings, and partly from the case presented by the pleadings.

This policy, having been effected by a corporation under its corporate seal, has been considered as imposing an obligation on the insured to bring covenant instead of assumpsit, as is usual on such contracts.

Thus the defendants have been obliged to plead specially; and the cause comes up on demurrer, which, of course, admits the case as made up on the pleadings.

Whether there is sufficient matter well pleaded why the plaintiff ought not to recover? is, therefore, the question before us.

I am of opinion that there is. I cannot for a moment suffer the sealing of the policy, or the form of the action, to impose any restriction upon the latitude of defence applicable to the contract of insurance. Such a doctrine would be fatal to every incorporated insurance company. I, therefore, maintain, that in the action of covenant on a policy of insurance, every defence may be taken advantage of, in pleading, that could be introduced in evidence before a jury. It is an exceedingly inconvenient form of action for trying the merits

of questions arising out of this species of contract, and I feel disposed, if possible, to diminish the inevitable difficulties, and the intricate and voluminous pleadings, which must grow out of this form of action, and to admit every facility which the rules of pleading will possibly sanction.

There are eight pleas filed to the present action. On the three first there are issues in fact, and the court below has given judgment on the remaining *five. I am disposed to concur [*113] in their decisions on each of these several pleas, although, perhaps, on some of them, for reasons not altogether the same with those by which they were influenced; but I shall confine my observations solely to the 6th plea, as that disposes of the case finally, if decided for the defendants, and has been the principal subject of the argument before this court.

The substance of this plea is, that the plaintiff misrepresented the age and tonnage of the vessel, whereby the defendants were induced to insure to a higher amount than they otherwise should; and concludes with averring, that the difference between the true age and tonnage of the vessel, and the represented age and tonnage, was material in regard to the contract of insurance.

The plaintiff replies that this misrepresentation was immaterial in regard to the seaworthiness of the vessel, her ability to perform the voyage, and the other risks insured against.

To me it appears that the plea presents the true turning point of the case, and that the replication draws towards questions very different from that which ought to control our decision.

It is not on the doctrine of seaworthiness that a misrepresentation is held to vitiate the policy, because the insured is always held to guaranty the sufficiency of his vessel to perform the voyage insured. Nor is it an evident and necessary increase of the risk; but it is presenting such false lights to the insurer, as induce him to enter into a contract materially different from that which he supposes he is entering into. It is a rule of law introduced to protect underwriters from those innumerable frauds which are practised upon them in a contract which must of necessity be regulated almost wholly by the information derived from the insured.

I do not lay so much stress upon the *misrepresentation [*114] with regard to the age of the vessel; for that appertains much to her seaworthiness; but with regard to her size the misrepresentation was so enormous as leaves no doubt upon my mind that had the case been submitted to a jury, the court would have been bound to charge them in favor of the defendants. It had in its nature an immediate tendency to entrap the defendants into one of the

most common and most successful snares laid for the unwary underwriter, — to make it the interest of the insured rather to sink than to save his vessel. It can very well be conceived that an underwriter may be induced to insure a certain sum upon a certain vessel for a very moderate premium, when no premium would induce him to insure double that amount upon the same bottom. I am aware of a very considerable difficulty arising out of this case, namely, how we are to estimate the degree of misrepresentation with regard to tonnage which shall vitiate a policy? but it is a difficulty arising out of the mode in which we are drawn into a decision on the case, rather than out of the case itself.

If this question had been brought before a jury, the difficulty would have vanished; but shall the party lose the benefit of this defence because the pleadings have assumed such a shape as to force the court into a decision upon the point without a jury? I am of opinion that he ought not, if it can be avoided; an extreme case may be supposed in which the misrepresentation may be very inconsiderable, as of a single ton for instance; but, on the other hand, we may suppose an extreme case of a misrepresentation to the highest possible number of tons burden, say 1,000 tons; will it be said that, in the latter case, the misrepresentation would not avoid the policy?

From these considerations it seems to result that the court is driven to the necessity of deciding this case upon its intrinsic merits, and reserving its opinion upon successive cases as they shall occur. This necessity is forced upon us by the alternative either to [* 115] decide that no misrepresentation, however gross, * of the size of the vessel will avoid a policy, or that any misrepresentation, however minute, will have that effect. It is to be hoped, in the mean time, that some statutory provision may be made, which will relieve the court from a similar embarrassment.

Judgment reversed.

The United States v. Judge Peters.

5 C. 115.

The fact that a State has an interest in the subject-matter of a suit between individuals, which it may choose to assert, does not oust the courts of the United States of jurisdiction. If such an interest is suggested as would make the State a necessary party, the suggestion must be examined and its correctness determined by the court.

An act of a state legislature cannot determine whether a court of the United States has jurisdiction.

It being suggested that a State was the owner of a fund proceeded against in the district court, in admiralty, the claim of the State was examined, and this court having found that the State was not a necessary party, a peremptory *mandamus* to the district judge to proceed, to adjudiciate between the individual parties, was awarded.

The court of appeals established by the continental congress, had power to reverse the sentence of a state court of admiralty.

AT the last term a rule upon the defendant, as district judge of Pennsylvania, having been granted, to show cause why a *mandamus* should not issue, and cause not having been shown, an alternative *mandamus* having issued, returnable at this term, a return was made and the case came on for a hearing. The material facts are stated in the opinion of the court.

*At this term, *Rodney*, (attorney-general,) *Lewis*, and *F. S. Key*, of counsel for Olmstead and others, submitted the return of the *mandamus* to the consideration of the court without argument. [*135]

MARSHALL, C. J., delivered the opinion of the court, as follows:

With great attention, and with serious concern, the court has considered the return made by the judge for the district of Pennsylvania to the *mandamus* directing him to execute the sentence pronounced by him in the case of Gideon Olmstead and others *v.* Rittenhouse's Executrixes, or to show cause for not so doing. The cause shown is an act of the legislature of Pennsylvania, passed subsequent to the rendition of his sentence. This act authorizes and requires the governor to demand, for the use of the State of Pennsylvania, the money which had been decreed to Gideon Olmstead and others; and which was in the hands of the executrixes of David Rittenhouse; and, in default of payment, to direct the attorney-general to institute a suit for the recovery thereof. This act further authorizes and requires the governor to use any further means he *may [*136] think necessary for the protection of what it denominates "the just rights of the State," and also to protect the persons and properties of the said executrixes of David Rittenhouse, deceased, against any process whatever, issued out of any federal court in consequence of their obedience to the requisition of the said act.

If the legislatures of the several States may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be deprecated by all; and the people of Pennsylvania,

not less than the citizens of every other State, must feel a deep interest in resisting principles so destructive of the Union, and in averting consequences so fatal to themselves.

The act in question does not, in terms, assert the universal right of the State to interpose in every case whatever; but assigns, as a motive for its interposition in this particular case, that the sentence, the execution of which it prohibits, was rendered in a cause over which the federal courts have no jurisdiction.

If the ultimate right to determine the jurisdiction of the courts of the Union is placed by the constitution in the several state legislatures, then this act concludes the subject; but if that power necessarily resides in the supreme judicial tribunal of the nation, then the jurisdiction of the district court of Pennsylvania, over the case in which that jurisdiction was exercised, ought to be most deliberately examined; and the act of Pennsylvania, with whatever respect it may be considered, cannot be permitted to prejudice the question.

In the early part of the war between the United States [* 137] and Great Britain, Gideon Olmstead and *others, citizens of Connecticut, who say they had been carried to Jamaica as prisoners, were employed as part of the crew of the sloop Active, bound from Jamaica to New-York, and laden with a cargo for the use of the British army in that place. On the voyage they seized the vessel, confined the captain, and sailed for Egg Harbour. In sight of that place, The Active was captured by The Convention, an armed ship belonging to the State of Pennsylvania, brought into port, libelled and condemned as prize to the captors. From this sentence Gideon Olmstead and others, who claimed the vessel and cargo, appealed to the court of appeals established by congress, by which tribunal the sentence of condemnation was reversed, The Active and her cargo condemned as prize to the claimants, and process was directed to issue out of the court of admiralty, commanding the marshal of that court to sell the said vessel and cargo, and to pay the net proceeds to the claimants.

The mandate of the appellate court was produced in the inferior court, the judge of which admitted the general jurisdiction of the court established by congress, as an appellate court, but denied its power to control the verdict of a jury which had been rendered in favor of the captors, the officers and crew of The Convention; and therefore refused obedience to the mandate; but directed the marshal to make the sale, and, after deducting charges, to bring the residue of the money into court, subject to its future order.

The claimants then applied to the judges of appeals, for an injunction to prohibit the marshal from paying the money, arising from the

sales, into the court of admiralty; which was awarded, and served upon him; in contempt of which, on the 4th of January, 1778, he paid the money to the judge, who acknowledged the receipt thereof at the foot of the marshal's return.

On the 1st of May, 1779, George Ross, the judge *of the [* 138] court of admiralty, delivered to David Rittenhouse, who was then treasurer of the State of Pennsylvania, the sum of 11,496*l.* 9*s.* 9*d.* in loan-office certificates; which was the proportion of the prize money to which that State would have been entitled, had the sentence of the court of admiralty remained in force. On the same day, David Rittenhouse executed a bond of indemnity to George Ross, in which, after reciting that the money was paid to him for the use of the State of Pennsylvania, he binds himself to repay the same, should the said George Ross be thereafter compelled, by due course of law, to pay that sum according to the decree of the court of appeals.

These loan-office certificates were in the name of Matthew Clarkson, who was marshal of the court of admiralty, and were dated the 6th of November, 1778. Indents were issued on them to David Rittenhouse, and the whole principal and interest were afterwards funded by him, in his own name, under the act of congress making provision for the debt of the United States.

Among the papers of David Rittenhouse was a memorandum, made by himself at the foot of a list of the certificates mentioned above, in these words: "Note. The above certificates will be the property of the State of Pennsylvania, when the State releases me from the bond I gave in 1778, to indemnify George Ross, Esq., judge of the admiralty, for paying the fifty original certificates into the treasury, as the State's share of the prize."

The State did not release David Rittenhouse from the bond mentioned in this memorandum. These certificates remained in the private possession of David Rittenhouse, who drew the interest on them during his life, and after his death they remained in possession of his representatives; against whom the libel in this case was filed, for the purpose of carrying into execution the decree of the court of appeals.

*While this suit was depending, the State of Pennsylva- [* 139] nia forbore to assert its title, and, in January, 1803, the court decreed in favor of the libellants; soon after which, the legislature passed the act which has been stated.

It is contended that the federal courts were deprived of jurisdiction in this cause, by that amendment of the constitution which exempts States from being sued in those courts by individuals. This

amendment declares, "that the judicial power of the United States shall not be construed to extend to any suit, in law or equity, commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State."

The right of a State to assert, as plaintiff, any interest it may have in a subject, which forms the matter of controversy between individuals, in one of the courts of the United States, is not affected by this amendment; nor can it be so construed as to oust the court of its jurisdiction, should such claim be suggested. The amendment simply provides, that no suit shall be commenced or prosecuted against a State. The State cannot be made a defendant to a suit brought by an individual; but it remains the duty of the courts of the United States to decide all cases brought before them by citizens of one State against citizens of a different State, where a State is not necessarily a defendant. In this case, the suit was not instituted against the State or its treasurer, but against the executrixes of David Rittenhouse, for the proceeds of a vessel condemned in the court of admiralty, which were admitted to be in their possession. If these proceeds had been the actual property of Pennsylvania, however wrongfully acquired, the disclosure of that fact would have presented a case on which it is unnecessary to give an opinion; but it certainly can never be alleged, that a mere suggestion of title in a State to property, in possession of an individual, must arrest the pro-
[* 140] ceedings of the court, and prevent their * looking into the suggestion, and examining the validity of the title.

If the suggestion in this case be examined, it is deemed perfectly clear that no title whatever to the certificates in question was vested in the State of Pennsylvania.

By the highest judicial authority of the nation it has been long since decided, that the court of appeals erected by congress had full authority to revise and correct the sentences of the courts of admiralty of the several States, in prize causes. That question, therefore, is at rest. Consequently, the decision of the court of appeals in this case annulled the sentence of the court of admiralty, and extinguished the interest of the State of Pennsylvania in The Active and her cargo, which was acquired by that sentence. The full right to that property was immediately vested in the claimants, who might rightfully pursue it, into whosoever hands it might come. These certificates, in the hands, first, of Matthew Clarkson, the marshal, and afterwards of George Ross, the judge, of the court of admiralty, were the absolute property of the claimants. Nor did they change their character on coming into the possession of David Rittenhouse.

Although Mr. Rittenhouse was treasurer of the State of Pennsyl-

vania, and the bond of indemnity which he executed states the money to have been paid to him for the use of the State of Pennsylvania, it is apparent that he held them in his own right, until he should be completely indemnified by the State. The evidence to this point is conclusive. The original certificates do not appear to have been deposited in the state treasury, to have been designated in any manner as the property of the State, or to have been delivered over to the successor of David Rittenhouse. They remained in his possession. The indents, issued upon them for interest, were drawn by David Rittenhouse, and preserved with the original certificates. When funded as *part of the debt of the United States, [*141] they were funded by David Rittenhouse, and the interest was drawn by him. The note made by himself at the foot of the list, which he preserved, as explanatory of the whole transaction, demonstrates that he held the certificates as security against the bond he had executed to George Ross; and that bond was obligatory, not on the State of Pennsylvania, but on David Rittenhouse, in his private capacity.

These circumstances demonstrate, beyond the possibility of doubt, that the property, which represented The Active and her cargo, was in possession, not of the State of Pennsylvania, but of David Rittenhouse as an individual; after whose death it passed, like other property, to his representatives.

Since then, the State of Pennsylvania had neither possession of, nor right to, the property on which the sentence of the district court was pronounced, and since the suit was neither commenced nor prosecuted against that State, there remains no pretext for the allegation that the case is within that amendment of the constitution which has been cited; and, consequently, the State of Pennsylvania can possess no constitutional right to resist the legal process which may be directed in this cause.

It will be readily conceived that the order which this court is enjoined to make by the high obligations of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty, and therefore must be performed. A peremptory *mandamus* must be awarded.

5 P. 190; 12 P. 657; 14 P. 614; 2 H. 497.

[*142] VIOLETT *v.* PATTON.

5 C. 142.

If a person write his name on a blank piece of paper, with the intent to have it operate as an indorsement of a negotiable note, to obtain a loan for the benefit of a friend, who is to sign as maker, and the note be written and signed, and the loan made on the faith of it, the signature operates as an indorsement, and binds the indorser.

When the error assigned is the refusal of the court to give a particular direction to the jury, the direction must be so perfectly stated, as to be proper to be given as stated.

ERROR to the circuit court for the District of Columbia, in an action of *assumpsit* by Patton as indorsee of a negotiable note indorsed by Violett. The exceptions and the material facts are stated in the opinion of the court.

E. J. Lee and *Youngs*, for the plaintiff.

Swann, for the defendant.

[*148] *MARSHALL, C. J., delivered the opinion of the court, as follows:

This case comes on upon two exceptions; one to the opinion of the circuit court given to the jury, and the other to the re-

[*149] fusal of that court to give an *opinion which was prayed by the counsel for the defendant below.

The declaration contains two counts. One upon the indorsement of a promissory note, and the other for money had and received to the plaintiff's use. The question arising on the first bill of exceptions is, whether the court erred in directing the jury respecting the liability of the defendant below, on the indorsement which was the foundation of the action.

The indorsement was made before the note was written; and it appeared that the body of the note was filled up by Patton. The opinion of the court was, that, if the jury should be satisfied, from the testimony, that Violett indorsed this paper for the purpose of giving Brooke a credit with Patton, and that, upon the faith of the note so drawn and indorsed, Patton did credit Brooke to the amount thereof, the circumstances, that the note was made subsequent to the indorsement, without any consideration from Brooke to Violett, and was filled up by the plaintiff, did not bar the action; and, further, that the said Brooke was to be considered as authorized by the said Violett to make the note to Patton.

This opinion is said to be erroneous; because,

1. The indorsement was made without consideration.
2. It was made on a blank paper.
3. There was no memorandum of the agreement in writing.

In support of the first point, the counsel for the plaintiff in error have cited several cases, intending to prove that an indorsement made without consideration, though it transfers the paper to the indorsee, creates no liability in the indorsor; and that a *promise in writing, made without consideration, is void. [*150]

So far as respects the immediate parties having knowledge of the fact, and so far as relates to an indorsement under the statute of Virginia, this is correct; but the real question in the cause is, does the testimony prove a sufficient consideration for the promise created by the indorsement? This is not intended to comprehend any writing on which an action of debt is given.

To constitute a consideration it is not absolutely necessary that a benefit should accrue to the person making the promise. It is sufficient that something valuable flows from the person to whom it is made; and that the promise is the inducement to the transaction. In the common case of a letter of credit given by A to B, the person who, on the faith of that letter, trusts B, is admitted to have his remedy against A, although no benefit accrued to A as the consideration of his promise. So in the present case, Patton trusted Brooke on the credit of Violett's name, and Violett wrote his name for the purpose of giving Brooke that credit with Patton. It was, in effect, and in intention, a letter of credit. The case shows that this was both the intention and the effect of Violett's giving his name to Brooke. In conscience, and in substance, then, it is a letter of credit, upon which the money, it was intended to secure, was advanced; and although in point of form the transaction takes the shape, and was intended to take the shape, of an indorsement, yet, so far as respects consideration, the indorsement has the full operation of an undertaking in the form of a letter of credit.

It is common in Virginia for two persons to join in a promissory note, the one being the principal and the other the security. Although the whole benefit is received by the principal, this contract has never been considered as a *nudum pactum* with regard to the security. So far as respects consideration, no *differ- [*151] ence is perceived in the cases. Violett has signed his name upon this paper, for the purpose of giving Brooke a credit with Patton, and his signature has obtained that credit. The consideration is precisely the same, whether his name be on the back or the face of the paper.

2. The second objection is, that the indorsement preceded the making of the note.

This objection certainly comes with a very bad grace from the mouth of Violett. He indorsed the paper with the intent that the promissory note should be written on the other side; and that he should be considered as the indorser of that note. It was the shape he intended to give the transaction; and he is now concluded from saying or proving that it was not filled up when he indorsed it. It would be to protect himself from the effect of his promise, by alleging a fraudulent combination between himself and another to obtain money for that other from a third person. The case of Russell and Langstaffe, reported in Douglass, 514, is conclusive on this point.

3. The third objection is, that there was no memorandum of the agreement in writing.

The argument on this point is founded on the idea that the statute of frauds in Virginia is copied literally from the statute of Charles II. This is not the fact. The first section of the act of Virginia differs from the 4th section of the stat. of Charles II. in one essential respect. The statute of England enacts that no action shall be brought, in the cases specified, "unless the agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. The Virginia act enacts that no action shall be brought in the specified cases, "unless the promise or agreement on which such action shall be brought, or some memorandum or note thereof, shall be in writing," &c. The reasoning of the judges, in the cases in which they have decided that the consideration
[*152] ought to be *in writing, turns upon the word agreement, of which the consideration forms an integral part. This reasoning does not apply to the act of Virginia, in which the word "promise" is introduced.

It was thought proper to notice this difference between the act of parliament, and the act of Virginia, although the opinion of the court is not determined by it. In this case the assignment does express a consideration. It is made for value received.

It is unnecessary to decide in this case, whether the declaration ought to have alleged that the indorsement was made on consideration. With that question the jury had no concern, and the direction of the court was not affected by it. There being no demurrer, it could only occur in arrest of judgment. But on a motion in arrest of judgment, the defendant below could not have availed himself of this error, if it be one, because there are two counts in the declaration, one of which is unquestionably good, and the court cannot perceive on

which the verdict was rendered. By the act of jeofails in Virginia there is no error if any one count will support the judgment.

The second exception is to the refusal of the circuit court to give the opinion, prayed for by the counsel for the defendant below.

When the error alleged is, not that the court has misdirected the jury, but that the court has refused to give a particular opinion, the opinion demanded must be so perfectly stated, that it becomes the duty of the court to give it as stated.

In this case, the opinion required by the counsel consists of two parts. The first is to instruct the jury "that if they shall be satisfied, from the evidence, that Richard Brooke, the maker of the note in this case, had, at the time the note became due, or at any time previous to the commencement of this suit against the defendant, property sufficient to pay *the debt claimed," &c., and [*153] the plaintiff brought no suit, then this action is not maintainable.

This court conceives that the circuit court ought not to have given this opinion. Had Richard Brooke possessed property before the making of the note, and not afterwards, the opinion, in the terms in which it was required, would have been a direction to find their verdict for the defendant. So if Richard Brooke had been in possession of property for a single day, and had the next day become insolvent, the court was asked to say that, in such a case, the indorsor could only be made liable by suit against the maker. Such a direction, in the opinion of this court, would have been improper.

The second branch of the opinion the circuit court was required to give, is in these words: "Or if the jury shall be satisfied that the said plaintiff and the said Brooke have, since the said note become due, both lived in the county of Fairfax, in Virginia, and have continued to reside in the county of Fairfax until the beginning of the present suit, and the plaintiff hath not brought suit against the said Brooke in Virginia, then the defendant is not liable in this action."

If the plaintiff had sued Brooke elsewhere than in Virginia, or if Brooke had become insolvent previous to the making of the note, and had continued to be so, the opinion of the court, if given as prayed, would have been, that, still, a suit against the maker of the note was necessary to give a right of action against the indorser.

This is not understood to be the law of Virginia. It is understood to be the law, that the maker of the note must be sued, if he is solvent, but his insolvency dispenses with the necessity of suing him. It is not known that any decision of the state courts requires that this insolvency should be proved by taking the oath of an insolvent debtor, nor is it believed that this is the only admissible

[*154] testimony of *the fact of insolvency. Other testimony may be admitted. It would therefore have been proper to leave it to the jury to determine whether it was, at any time, in the power of the plaintiff to have made the money due on this note, or any part of it, from the maker by suit; and their verdict ought to have been regulated by the testimony in this respect.

This opinion was not required.

This court is of opinion that there is no error, and that the judgment is to be affirmed with costs.

15 P. 290; 3 H. 515.

Pierce v. Turner.

5 C. 154.

Where a statute declared that all conveyances, not acknowledged and recorded, should be valid as between the parties and their heirs, but void as to all creditors and subsequent purchasers, it was held, that only creditors and purchasers of the grantor, were intended; and that creditors of the husband, could not claim property of the wife, settled on her by an ante-nuptial deed, not recorded.

Error to the circuit court for the District of Columbia. The material facts appear in the opinion of the court.

E. J. Lee, and *Swann*, for the plaintiff.

C. Simms, *P. B. Key*, and *Jones*, for the defendant.

[*164] *Washington, J., delivered the opinion of the court as follows, namely:

This is an action brought by a creditor of Charles Turner, against Rebecca Turner, who is charged as his executrix; and the questions submitted to the consideration of the court are, 1st. Whether the slaves, mentioned in the deed of the 14th of February, 1798, are to be taken as assets belonging to the estate of Charles Turner; and if so, then, 2d. Whether Mrs. Turner can, under the circumstances of this case, be properly charged as an executrix of her own wrong? If the first question be determined in favor of the defendant in error, it will become unnecessary to consider the second; as it does not appear that Mrs. Turner intermeddled in any manner with the estate

of her deceased husband, unless these slaves did, in point of law, constitute a part of that estate.

* The first question depends upon the construction which [* 165] the court may give to the 4th section of the statute of Virginia, passed on the 13th of December, 1792, entitled "An act for regulating conveyances," which declares that all conveyances of land, marriage settlements of lands, slaves, or other personal property, deeds of trust and mortgages thereafter made, should be void as to all creditors and subsequent purchasers, unless the same were acknowledged or proved, and recorded within the time prescribed by the statute; but that the same as between the parties and their heirs should nevertheless be valid and binding.

The deed from Rebecca Kenner, the defendant in error, previous to her intermarriage with Charles Turner, by which the slaves in question were settled on the said Charles Turner and herself, during their lives, and the life of the longest liver of them, with remainder to the heirs of the said Rebecca, not having been proved and recorded within the time prescribed by law, it is contended by the plaintiff in error that the same became void as to the creditors of Charles Turner, whose rights remained unimpaired by that deed, in the same manner as if it had never been made; in which case, it is not denied that an absolute estate would have vested in the husband, on his marriage.

This argument proceeds upon the ground, that by the words "all creditors and subsequent purchasers," is meant as well the creditors of the grantee and subsequent purchasers from him, as those who might derive title under the grantor. Although the words are certainly broad enough to comprehend the whole, it is believed by a majority of the court that the construction should be such as to limit the application of them to the creditors of, and subsequent purchasers from, the grantor. In no case but one, where a title can be set up for the grantee paramount the deed, can it ever be the interest of a creditor of the grantee to insist upon such a construction as is contended for in this; for as he must derive his title * under the deed, if it be void as to him, it is impossible for [* 166] him to found a claim upon it in right of the grantee, whose only title is under the deed. It would be strange that a deed should be binding upon the grantee and his heirs, and yet void as to persons claiming under him, for a valuable consideration; and yet such would be the consequence, if the words "all creditors and subsequent purchasers" should be understood to apply to persons claiming under the grantee as well as those claiming under the grantor. Indeed it would seem repugnant and absurd, to apply the same expressions to

persons, who, if they claim at all, must claim under the deed, and also to those who claim against the deed; in the latter case, the invalidity of the deed is consistent with the claim, in the former it is destructive of it.

It may be said, however, that these observations are inapplicable to this particular case, because the creditors of the husband do not claim under, but against the deed; and, in this respect, stand upon the same ground as the creditors of the grantor. But if in every other case which can be stated, the invalidity of the deed is applicable to the creditors of the grantor, or those claiming under him, and to none other, by what rule of construction, can the same words have a more extended meaning, so as to be applied to persons who claim in right of a party to the same deed other than the grantor. If the deed in question had granted to Charles Turner, an estate in fee as to the land, and for life in respect to the slaves, would it have been void as to simple contract creditors, who could go only against the personal estate, and good as to specialty creditors, who might subject the real assets? and yet, if the deed be void at all as to the creditors of the husband, it must be so throughout; in which case it might well be doubted whether the land could be made liable to the payment of the husband's debts; or, to present the question in a less doubtful shape, would the deed be considered void as to a purchaser from the husband, of the slaves, and good as to a purchaser of the land? Let the true interpretation of the words "all [*167] *creditors and subsequent purchasers" be once ascertained, and every difficulty in the case is at an end. If they are construed to mean the creditors of the grantor, or subseqent purchasers from him, then, the deed being good between all the parties to it, no estate vested in Charles Turner, but such as the deed itself passed to him. The title of his creditors being clearly derivative, if he had no title under the deed, (and being himself bound by it, he could have none which was inconsistent with it,) then his creditors could have none. But if he had a title incompatible with that granted by the deed, then he was not bound by the deed; contrary to the statute which declares that he was bound. If his creditors have any such title, it cannot be derived from him, when, in point of law, he had none in himself; and, independent of his title, it is impossible to show any in them. If a subsequent purchaser, with notice of a prior unrecorded deed, could not prevail against the title of the first purchaser, and most unquestionably he could not, how much stronger is the case when such subsequent purchaser is even a party to the first deed, and claims an interest under it? To say in this case, that, upon the marriage of Charles Turner, or at any time

afterwards, the law cast upon him an estate in the property conveyed by this deed, of which he had notice, and to which he was a party, inconsistent with the estate conveyed to him by that deed, (and this must be said, if his creditors can claim such estate in his right,) is, in the opinion of a majority of the court, repugnant to the plain meaning and spirit of the law under consideration.

That creditors of the husband, or purchasers from him, may be injured by the construction which this court feels itself compelled to give to this law, need not be denied; but it is not for this tribunal to afford them relief. It might, perhaps, be well if the law were so amended as to render deeds made in contemplation of marriage void in express terms, as to the creditors of the husband, or purchasers from him, in case the same should not be recorded within the time prescribed by law.

*The court has felt some difficulty in consequence of a [*168] decision of the court of appeals in the case of Anderson *v.* Anderson, 2 Call. 163; but it is believed that the judgment in that case was perfectly correct, let the particular point which occurs in this cause be settled one way or the other. In that case, the contract was not only executory and rendered void at law, by the subsequent intermarriage of the parties to the contract, but it was, at the time when the slaves were taken in execution, perfectly contingent whether the wife could ever claim any interest in them, in opposition to persons deriving title under the husband. For if the husband should have survived the wife, or if they should have had issue, the absolute legal estate of the husband, gained by the intermarriage, would have remained unaffected by the deed. There was, therefore, no reason why the creditors of the husband should be prevented from receiving satisfaction of their debts out of his legal estate in the slaves, because it was subject to an equitable contingent interest in the wife, which might never become effectual. A court of equity might well say to her, as you have no remedy, at law, for a breach of the contract by the husband, in consequence of not having interposed trustees to protect your rights, and have omitted to record the deed by which creditors and subsequent purchasers might be defrauded, we will not now decree you a specific performance against creditors who have law and equity on their side.

Decree affirmed.

JOHNSON, J. I am unfortunate enough to dissent from my brethren in this case. I think the creditors of Turner entitled to recover, and entitled to recover in this form of action.

I will not contest the general principle, that the creditors, to whose

benefit this act must be understood to operate, are the creditors of that party only from whom the estate moves. But this case presents an exception to the general rule; and the reasoning,
[*169] *from which the general conclusion results, will be found inapplicable to the case of husband and wife, with regard to the personal estate of the latter.

The words of the act are admitted to be sufficiently comprehensive to include the creditors of both; the general rule is, that the letter must prevail; and it is only when an adherence to the letter will involve a court in absurdity, or inextricable difficulty, that the spirit is resorted to as a restriction upon the literal meaning. But the construction which I give to this act removes repugnance and absurdity, and produces a concordance between the letter and the spirit, which appears to my mind conclusive upon its correctness.

What was the object of the legislature? It was to protect the community from that false credit which men acquire in society, from the possession of or supposed interest in property; to place within their reach the means of avoiding those frauds which may be practised upon them, by the possessor of property, when an estate or interest in it exists, in fact, in some other person.

The argument in favor of the defendant is, that the creditors of the grantee can derive no benefit from a deed which the act declares void, and which, consequently, could vest no interest in their debtor. Through him they must claim, and no other estate but that which existed in him, ought to be subjected to their debts.

I will not pass an opinion upon the correctness of an argument which, in the case where possession follows the alienation, may make the act productive of the very fraud which it was intended to obviate. My opinion is founded upon a ground which is unaffected by the conclusion upon this point, or rather in perfect coincidence with that conclusion. I deduce my conclusion from the consideration that the claim of Turner's creditors is not derived through
[*170] *the deed, but is, in fact, in direct hostility with its operation. The effect of the marriage, in transferring the property to the husband, is the foundation of their claim; and the deed executed on the intermarriage of the defendant with Charles Turner, constitutes the subject of the defence against their claim. The creditors, in order to maintain their action, prove, first, the property in the wife before marriage, then her intermarriage with their debtor. These facts, in operation of law, upon her personal property, sustain their right of recovery. But, in opposition to their claim, the wife endeavors to avail herself of this deed; and this question is brought up on an exception taken by the creditors to its legal validity. The

ground of their objection is, that it wants that evidence of authenticity which the law requires, to make it, as to them, a valid instrument. No doubt is entertained with regard to the invalidity of this instrument, as to one description of creditors; but it is contended, on behalf of the defendant, that no other creditors can avail themselves of that objection, except the creditors of the wife before marriage. There appears to me to be no reason for the distinction in the case of husband and wife. Her creditors before marriage become his during coverture; she can contract no debts to which she can be made personally liable; her personal property becomes his by the act of intermarriage, and he acquires all the credit, in society, resulting from the acquisition and possession of that property. It is not upon a deed, which this act declares void, that the creditors found their claim, but upon an act in *pais*, the operation of which is an immediate transfer of property, unless that effect be prevented by the legal execution of some instrument of writing. If such an instrument, executed before marriage, be not recorded within eight months, it loses all legal validity as to creditors, and it is the same as if no such instrument had ever been executed. The recording, as to them, is as necessary as the sealing and delivery is between the parties.

* The consistency of this opinion with the argument that [*171] the creditors of the grantee can derive no interest under a deed which, as to them, is declared void, will appear from distinctly reflecting on the necessary consequence of such an admission in this case. Declare the deed void, and what is the consequence? It no longer affects the property of the wife, so as to produce a state of things different from that which would exist if it had never been created; and the operation of the deed was not to vest an interest or estate in Charles Turner, but to prevent any estate from vesting in him by the ordinary effect of marriage. Remove the preventing cause, and the property becomes, unquestionably, subject to the husband's debts.

Two objections to this opinion have been urged, on which it may be proper to make some remarks. The first that I shall notice is, how the same deed can be valid as between the parties, so as really to prevent any transfer of property to the husband, and yet, through him, creditors may derive such an interest as to subject it to the payment of his debts. If this argument proves any thing, it proves too much. A moment's reflection will show, that it is as applicable to the case of the grantor as of the grantee; for, after the execution of the deed, the grantor has, in fact, and in the acknowledgment of the act, no more interest in the property than the grantee had before its execution, or upon its becoming void for want of recording. But

every apparent absurdity may be reconciled thus. Legal claims must be supported by legal proof. The abstract rights of parties become immaterial, if not susceptible of substantiation by evidence. In a question, then, between the direct representatives of the husband and wife, the deed is a valid instrument, and may be received as duly authenticated written evidence, to support a right derived under it. But, between the one party and the creditor of the other, the law declares it wholly inefficacious, for want of a ceremony which is made essential to its authenticity. The most ordinary deed [*172] cannot be * received in evidence until proved according to the rules of evidence; and the operation of individual acts, in producing transfers of property, must ever be subject to such modifications as may be made by positive law.

The other difficulty arises from the consideration how this deed can be valid against all persons (which it confessedly is) during eight months, and then cease to operate as to creditors. To this it may be answered, that this objection, as well as the preceding, is equally applicable to the case of the creditor both of alienor and alienee; and if valid at all, might defeat the operation of this act altogether. But, as a provision of positive law, such considerations are not to defeat it. Possibly some inconvenience may result from holding property in this suspended situation; but the duration of the inconvenience is not long, nor the contingency far remote. Nor is an analogous state of things unknown to the common or civil lawyer; executory devises, contingent remainders, and shifting uses, produce a similar uncertainty and suspension of right. During the eight months which are given for recording a deed, the interests of parties must have vested only *sub modo*, or subject to the contingency of recording it within the legal time; and no doubt a court of equity would interpose its authority, during that period, to adjust the rights of parties. Nor will this objection at all affect the opinion which I entertain respecting the rights of the plaintiff; for, although the deed certainly did hold the personal property of the wife in a suspended state, during the eight months, so that the creditors could not, in that time, have taken it under execution, yet, after the expiration of that period, the deed lost its protecting effect, and that property then became subject to their debts.

These views of the subject appeared to me to solve every difficulty, and lead to a conclusion upon the second point made in the argument; namely, whether the defendant may be charged as executrix *de son tort*. The case of Edwards *v.* Harben, 2 T. R. 587, [*173] comes * fully up to the present, and it will be found of necessity, in order to give effect to this act, that this remedy

should be countenanced. The hardships of it would, no doubt, be remedied by a court of equity, in cases free from collusion or moral fraud, so as to prevent the defendant from being charged to an amount greater than the value of the goods which actually came to her hands. But the necessity of sanctioning this mode of pursuing property, circumstanced as in this case, will appear from the impossibility of a creditor's getting at it in any other manner, at law. Should the creditor himself administer, he can never recover it, because, as the legal representative of the husband, the deed would be valid against him without being recorded. Should any other person administer, he could never be charged with the value of assets, which for the same reason could never come to his hands. So that both precedent and principle concur in supporting the correctness of permitting him to resort to the present remedy.

KEMPE'S LESSEE v. KENNEDY et al.

5 C. 173.

The inferior court of common pleas of the State of New Jersey, having general jurisdiction in cases of treason, was not, technically, an inferior court, and its judgment of forfeiture, though erroneous, cannot be disregarded while unreversed.

Erroneous judgments of an inferior court, which has exceeded its jurisdiction, are void, those of other courts only voidable.

ERROR to the circuit court of the United States for the district of New Jersey, in an action of ejectment brought by John Den, lessee of Grace Kempe, a British subject, against R. Kennedy and M. Cowell, citizens of the State of New Jersey, for land in that State.

Upon the trial of the cause upon the general issue, a bill of exceptions was taken by the plaintiff, which presents the following case:

Grace Coxe, the lessor of the plaintiff, being seized in fee of the land in question, before the year 1772 intermarried with John Tabor Kempe, who died in August, 1792. They resided in New York before and during the war with Great Britain, and went to Great Britain when New York was evacuated * by the [* 174] British army. Grace Kempe, since the death of her husband, has continued to reside, and now resides, in Great Britain, where he died; having been in possession of the land in right of his

wife, on the 1st of March, 1776, and until the same was seized by the authority of the State of New Jersey.

The defendants relied upon several acts of the legislature of New Jersey; an inquisition taken under the authority of those acts; a judgment of the inferior court of common pleas for the county of Hunterdon, in May, 1779, upon that inquisition, confiscating the estate; a judgment of the inferior court of common pleas for the county of Sussex; an execution upon that judgment and a deed from Joseph Gaston, an agent for the State of New Jersey, to the defendant Kennedy, whose tenant the other defendant was; and proved, that he had always been in possession under that deed from the day of its date, to the day of trial.

Upon this case the plaintiff prayed the court to instruct the jury that they ought to find a verdict for him; which the court refused, and directed the jury that they ought to find a verdict for the defendants; to which refusal and direction the plaintiff excepted, and brought his writ of error.

R. Stockton, for plaintiff in error.

Lewis, contrà.

[*184] *Marshall, C. J., delivered the opinion of the court, as follows:

In this case two points are made by the plaintiff in error.

1. That the judgment rendered by the court of common pleas, which is supposed to bar the plaintiff's title, is clearly erroneous.

2. That it is an absolute nullity, and is to be entirely disregarded in this suit.

However clear the opinion of the court may be, on the first point, in favor of the plaintiff, it will avail her nothing unless she succeeds upon the second. Without repeating, therefore, those arguments which have been so well urged at the bar, to show that the inquisition in this case did not warrant the judgment which was rendered on it, the court will proceed to inquire whether that judgment, while unreversed, does not bar the plaintiff's title.

The law respecting the proceedings of inferior courts, according to the sense of that term as employed in the English books, has been correctly laid down. The only question is, was the
[*185] court, in *which this judgment was rendered, "an inferior court," in that sense of the term?

All courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgment may be carried;

but they are not, therefore, inferior courts in the technical sense of those words. They apply to courts of a special and limited jurisdiction, which are erected on such principles that their judgments, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. The courts of the United States are all of limited jurisdiction, and their proceedings are erroneous, if the jurisdiction be not shown upon them. Judgments rendered in such cases may certainly be reversed, but this court is not prepared to say that they are absolute nullities, which may be totally disregarded.

In considering this question, therefore, the constitution and powers of the court, in which this judgment was rendered, must be inspected.

It is understood to be a court of record, possessing, in civil cases, a general jurisdiction to any amount, with the exception of suits for real property.

In treason, its jurisdiction is over all who can commit the offence.

The act of the 4th of October, 1776, defines the crime, and that of the 20th of September, 1777, prescribes the punishment. The act of the 18th of April, 1778, describes the mode of trial, and the tribunal by which final judgment shall be rendered. That tribunal is the inferior court of common pleas in each county. Every case of treason, which could arise under the former statutes, is to be finally decided in this court. With respect to treason, then, it is a court of general jurisdiction, so far as respects the property of the accused.

*The act of the 11th December, 1778, extends the crime [*186] of treason to acts not previously comprehended within the law, but makes no alteration in the tribunal before which this offence is to be tried, and by which final judgment is to be rendered.

This act cannot, it is conceived, be fairly construed to convert the court of common pleas into a court of limited jurisdiction, in cases of treason. It remains the only court capable of trying the offences described by the laws which have been mentioned, and it has jurisdiction over all offences committed under them.

In the particular case of Grace Kempe, the inquest is found in the form prescribed by law, and by persons authorized to find it. The court was constituted according to law; and, if an offence, punishable by the law, had been in fact committed, the accused was amenable to its jurisdiction, so far as respected her property in the State of New Jersey. The question whether this offence was or was not committed, that is, whether the inquest which is substituted for a verdict on an indictment, did or did not show that the offence had been committed, was a question which the court was competent

to decide. The judgment it gave was erroneous, but it is a judgment, and, until reversed, cannot be disregarded.

This case differs from the case from third Institute in this: In that case the court was composed of special commissioners authorized to proceed, not in all cases of treason, but in those cases only in which an indictment had been taken before fifteen commissioners. Their error was not in rendering judgment against a person who was not proved by the indictment to have committed the crime, but who, if guilty, they had no power to try. The proceedings there were clearly *coram non judice.*

[*187] It is unnecessary to notice the eleventh section of *the act, since, without resorting to it, this court is of opinion that there is no error in the judgment of the circuit court.

It is affirmed, with costs.

10 W. 192; 3 P. 193; 2 H. 9; 6 H. 31; 8 H. 586.

THE MARINE INSURANCE COMPANY OF ALEXANDRIA *v.* JAMES YOUNG.

5 C. 187.

The court is not bound to give a construction to an ambiguous answer to a question in a deposition, upon the request of the jury.
The refusal of a new trial cannot be assigned for error.

ERROR to the circuit court for the District of Columbia, in an action on a policy of insurance. In the course of the trial it became material, whether the insured had notice of a certain storm, when he gave the order to insure. Part of the evidence was in a deposition, which contained the following passage: "On what day in December did you inform the plaintiff that there had been a gale of wind in Jamaica?" To which it was stated in the deposition, that he answered, "that on the 13th of December, 1800, he had informed the plaintiff (below) that there had been a strong northern in Jamaica; the circumstance which induced him to mention this, was in consequence of a very heavy gale having happened the day before, and the brig Mary, being then in Hampton Roads, which produced this remark, that he had a blowing voyage out, being compelled to throw over his guns, and that the aforesaid northern had happened when he was in St. Anne's."

After the jury had retired to consider of their *verdict, [*188] they sent a written paper to the judges, requesting to be instructed by the court, whether the above answer of David Young would admit of any other reasonable or legal construction, than that the 13th of December, 1800, was the first information given by him to the plaintiff below of the storm of the 2d of November.

But the court refused to give any opinion to the jury upon the construction of the answer of David Young, unless with the assent of both parties; and the counsel for the plaintiffs in error refused to assent, and took a bill of exceptions to the refusal of the court to instruct the jury, without the consent of both parties.

The jury found a verdict for the defendant in error; and before judgment, the plaintiffs in error moved the court for a new trial, upon the ground that the verdict was contrary to evidence.

The court refused to grant a new trial.

C Lee and *E. J. Lee*, for the plaintiffs in error.

Swann, for the defendant.

*Cushing, J., delivered the opinion of the court, as fol- [*190] lows:

This court is of opinion that the inferior court *was not [*191] bound to give a construction of the answer of Captain David Young to the second interrogatory of the plaintiff below, as requested by the jury; and that it would be improper in this court to determine whether the inferior court ought or ought not to have granted the motion of the defendants below for a new trial, upon the ground that the verdict was contrary to the evidence.

Johnson, J. "My object in expressing my opinion in this case, is to avoid having an ambiguous decision hereafter imputed to me, or an opinion which I would not wish to be understood to have given.

"I decide against the appellant on the first point, because an examination of a witness, taken under commission, cannot possibly be considered written evidence, as the counsel have contended it is; nor is the meaning of a witness, words for the court to determine; but strictly within the province of the jury.

"I decide against the appellant on the second ground, because I am of opinion that no appeal lies to this court from the decision of a circuit court on a motion for a new trial."

The judgment below is to be affirmed, with costs.

5 H. 215; 7 H. 185.

Bodley and others v. Taylor.

5 C. 191.

Though the land law of Kentucky furnishes a remedy for trying, at law, rights under entries, previous to the emanation of a patent, yet a court of equity has jurisdiction, upon the ground that an entry is notice, and a legal title afterwards acquired is subject to the equitable right.

This jurisdiction is to be exerted, in conformity with the principles of equity, and not merely upon the rules which would govern a court of law.

In Kentucky, if a natural object is called for, as about a certain distance from a fixed monument, and the object cannot be found, the call for it is rejected, and the distance mentioned taken as the precise distance.

If an entry be placed on a road, at a certain distance from a given point, by which the road passes, the distance is to be computed by the meanders of the road, and not by a straight line, unless there is something to show another intent. If only the quantity and one line are described the location is to be made in a square.

A call for the settlement and preëmption of J. before a location of the preëmption right of J. has been made, is substantially a call for the land of J.

In Kentucky, an entry is sufficient if it has that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own land on the adjacent residuum.

If a subsequent locator has embraced in his patent, land included in a prior entry, he must convey the legal title thereof to such prior locator, without a conveyance from the latter, of lands held by him, not within his entry, but within that of the subsequent locator, but not surveyed as part thereof.

Error to the district court of the United States for the District of Kentucky, in a suit in equity. The nature of the case and the material facts, appear in the opinion of the court.

The cause was three times argued. At the February term, 1806, by *Taylor* and *P. B. Key*, for the respondent; and *Hughes*, for the complainants; and at the February term, 1807, by *Hughes* and *H. Marshall*, for the complainants, and *H. Clay* and *P. B. Key*, for the respondents; and at this term by *Pope*, for the complainants, and *P. B. Key*, for the respondent.

[*220] *February* 27, 1807—*Marshall, C. J. The court has been able to form an opinion as to a part only of this case.

That the court as a court of chancery has jurisdiction of such cases, is a point established by a long course of practice in Virginia and Kentucky; but in the exercise of that jurisdiction, it will proceed according to the principles of equity. In such case, a prior [*221] entry will be considered as notice to him *who has the legal title, if such entry be sufficiently certain. And the legal title will be considered, as holden for him who has the prior equity.

March 14, 1809 — MARSHALL, C. J., delivered the opinion of the court, as follows:

This is an appeal from a decree of the court for the district of Kentucky, by which Taylor was directed to convey to Bodley and others a part of a tract of land to which he held an elder patent, but to which Bodley and others claim the better right under a junior patent. The judge of the district court having directed such part of the land held by Taylor to be conveyed to Bodley and others, as appeared by certain rules, which he has applied to the case, to be within their claim, and not within Taylor's location, and having dismissed their bill as to the residue, each party has appealed from his decree.

Previous to any discussion of the rights of the parties, it has become necessary to dispose of a preliminary question.

The defendant in the court below objects to the jurisdiction of a court of equity, and contends not only that the present case furnishes no ground of jurisdiction, upon general principles, but that the land law under which both titles originate, in giving a remedy by which rights under entries might be decided previous to the emanation of a patent, has prohibited an examination of the same question after a patent shall have issued.

Had this been a case of the first impression, some contrariety of opinion would perhaps have existed on this point. But it has been sufficiently shown that the practice of resorting to a court of chancery in order to set up an equitable against the legal title, received, in its origin, the sanction of the court of * appeals, while [* 222] Kentucky remained a part of Virginia, and has been so confirmed by an uninterrupted series of decisions as to be incorporated into their system, and to be taken into view in the consideration of every title to lands in that country. Such a principle cannot now be shaken.

But it is an inquiry of vast importance whether, in deciding claims of this description, a court of equity acts upon its known, established and general principles, or is merely substituted for a court of law, with power to decide questions respecting rights under the statute, as they existed previous to the consummation of those rights by patent.

It has been argued that the right acquired by an entry is a legal right, because it is given by a statute; that it is the statutory inception of a legal title which gives to the person making it a right, against every person not having a prior entry, to obtain a patent and to hold the land. The inference drawn from this is, that as the law affords no remedy against a person who has defeated this right by improperly obtaining a prior patent, a court of chancery, which can

afford it, ought to consider itself as sitting in the character of a court of law, and ought to decide those questions as a court of law would decide them, if capable of looking beyond the patent.

This reasoning would perhaps be conclusive if a court of chancery was, by statute, substituted in the place of a court of law, with an express grant of jurisdiction in the case. But the jurisdiction exercised by a court of chancery is not granted by statute; it is assumed by itself: and what can justify that assumption but the opinion that cases of this description come within the sphere of its general action? In all cases in which a court of equity takes jurisdiction, it will exercise that jurisdiction upon its own principles. It is believed that no exception to this rule is to be found in the books, and the state of land titles in Kentucky is not believed to furnish one. The [* 223] true ground of the jurisdiction *of a court of equity is, that an entry is considered as a record of which a subsequent locator may have notice, and therefore must be presumed to have it; consequently, although he may obtain the first patent, he is liable, in equity, to the rules which apply to a subsequent purchaser with notice of a prior equitable right. This certainly brings the validity of the entries before the court, but it also brings with that question every other which defeats the equity of the plaintiff.

The court, therefore, will entertain jurisdiction of the cause, but will exercise that jurisdiction in conformity with the settled principles of a court of chancery. It will afford a remedy which a court of law cannot afford, but since that remedy is not given by statute, it will be applied by this court as the principles of equity require its application.

Neither is the compact between Virginia and Kentucky considered as affecting this case.

If the same measure of justice be meted to the citizens of each State, if laws be neither made nor expounded for the purpose of depriving those who are protected by that compact of their rights, no violation of that compact is perceived.

The court will proceed, then, to inquire into the rights of the parties, and, in making this inquiry, will pay great respect to all those principles which appear to be well established in the State in which the lands in controversy lie.

Taylor holding the eldest patent, it is necessary that the complainants below should found their title on a good entry. The validity of their entry, therefore, is the first subject of examination.

It was made on the 17th of October, 1783, and is in these words: "Henry Crutcher and John Tibbs enter 10,000 acres of land on a treasury warrant, beginning at a large black ash and small buck-

eye marked thus, I. T., on one side of a buffalo *road [*224] leading from the lower Blue Licks a N. E. course, and about seven miles N. E. by E. from the said Blue Licks," &c.

The only objection to this entry is, that the beginning is uncertain.

Were the validity of this objection to be admitted, it would shake almost every title in Kentucky. If it be recollected that almost every acre of good land in that State was located at a time when only a few individuals, collected in scattered forts or villages, encroached on the rights of the savages and wild beasts of the country; that neither these sparse settlers, nor those hardy adventurers who travelled thither in quest of lands, could venture out to explore the country, without exposing their lives to imminent hazard; that many of those who had thus explored the country, and who made locations, were unlettered men, not only incapable of expounding the laws, but some of them incapable of reading; it is not wonderful that the courts of Kentucky should have relaxed, in some degree, the rigor of the rule requiring an impracticable precision in making entries, should have laid hold of every circumstance which might afford that certainty which the law has required, and should be content with that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own lands on the adjacent residuum.

The entry of Crutcher and Tibbs possesses this reasonable certainty.

The Blue Licks was a place of general notoriety, and there appears to have been no difficulty in ascertaining the point from which the mensuration should commence. There being only one of the three roads leading from that point, which ran nearly a N. E. course, no subsequent locator could doubt on which road this land was placed. The entry having called for visible objects on the road about *seven miles from the Licks, those visible ob- [*225] jects might be discovered without any extraordinary exertion; and if they could not be discovered, then that call, according to the course of decisions in Kentucky, would be discarded, and about seven miles would be considered as seven miles. But those objects remained, and it appears that no difficulty has arisen, or ought to arise, on this point. The jury have found it to be the beginning called for in the entry.

The entry, therefore, of Crutcher and Tibbs is sufficiently certain and the court will proceed to examine the entry and survey of Taylor.

This entry being the last link of a chain commencing with Jacob Johnson, it is necessary to fix Jacob Johnson, in order to ascertain the position of Taylor.

Jacob Johnson's title is a settlement and preëmption; a certificate

for which was granted by the commissioners, on the 7th day of January, 1780, in the following terms:

Peter Johnson, heir at law of Jacob Johnson, deceased, this day claimed a settlement and preëmption to a tract of land in the district of Kentucky, lying on the east side of the buffalo road leading from the Blue Licks to Limestone, nine miles from the Lick on the upper road, by the said decedent's raising a crop of corn in the year 1776. Satisfactory proof being made to the court, they are of opinion that the said Peter Johnson, &c. has a right to a settlement of 400 acres of land, to include the above location, and the preëmption of 1,000 acres adjoining, and that a certificate issue accordingly.

On the 21st of February, 1780, this certificate, so far as respected the settlement of 400 acres, was entered with the surveyor.

[*226] It is the opinion of the court that the 400 acres * of land should lie entirely on the east side of the road, that it should begin at the distance of nine miles, and that those miles should be computed not by a straight line, but according to the meanders of the road.

In this respect the court perceives a clear distinction between a call for one place by its distance from another, if the intermediate space be entirely woods, or if a stream, which cannot well be followed, passes from the one to the other, and where a road is called for, which conducts individuals from point to point. The distance of places from each other is not generally computed by a stream not navigable, but is always computed by a road which is travelled. It is, therefore, the opinion of the court that where, as in this case, there is no other call in the entry showing a contrary intent, and the entry is placed on a road at a certain distance from a given point by which the road passes, the distance is to be computed by the meanders of the road, and not by a straight line.

The beginning of Johnson's settlement being found, and its western side being placed along the road, the next inquiry is, in what manner the land is to be surveyed.

In order to give certainty to locations of this description, the courts of Kentucky have uniformly determined that they shall be understood as being made in a square. Johnson's line upon the road, therefore, must extend along the road until two lines at right angles from each end of this base shall, with a third line parallel to the general course of the road, include, in a figure which, if the road be reduced to a straight line, would make a square, the quantity of 400 acres on the east side of the road.

The next link in this chain of entries, on which the title of Taylor depends, is Ambrose Walden's.

On the 22d of May, 1780, Ambrose Walden *entered [*227] 1,333 acres on the east side of Jacob Johnson's settlement and preëmption, on the waters of Johnson's Fork, a branch of Licking, to include two cabins on the north side of said Fork, built by Simon Butler, and to run eastwardly for quantity.

The cabins, it is said, cannot be found; or, if found, cannot be distinguished. The waters of Johnson's Fork would be too vague, and, therefore, the validity of this entry must depend on the call for Johnson's settlement and preëmption.

This is said to be insufficient, because the preëmption had not, at that time, been located with the surveyor, and the certificate of the commissioners was no location. Johnson's preëmption, therefore, had, on the 22d of May, 1780, no locality, a subsequent entry could not depend upon it; for it might be placed in any situation, or in any form, provided it be so placed as to adjoin his settlement in any point.

The argument with respect to the preëmption appears to the court to be conclusive. This preëmption right certainly had no locality on the 22d of May, 1780, and an entry made to depend entirely on it would have been too vague, too uncertain, to be maintained. But it does not follow that the entry of Ambrose Walden is void. He does not call singly for the preëmption, he calls for "the east side of Johnson's settlement and preëmption right;" and it seems to the court that a fair application of the principles which have governed in Kentucky in similar cases, will maintain this location.

The settlement was actually located; the preëmption, at the time, had no other than a potential existence; and the uniform course of decisions appears to have been to discard one call which is either impossible or uncertain, and to support the entry, if there be other calls which are sufficiently certain. The decisions have gone so far as to dismiss a part of the description of a single call, if other terms of *description be sufficient to ascertain the [*228] thing called for. Now the call for the settlement right is valid and certain; and the court is not of opinion that this certainty is rendered uncertain by being united to the call for a preëmption which had no real existence.

The call appears to be substantially the same as if it had been for the land of Johnson. His settlement and preëmption was perhaps the name which, in common parlance, designated this land even before the location of the preëmption, because it was appendant to the settlement. It has been decided that a call for the land would be good, and the court thinks that decision applicable to this case.

Against this has been urged the doubt which a subsequent loca-

tor would have entertained at the time, whether Johnson might not have been permitted to locate his preëmption on any land adjoining his settlement, and whether Walden's entry calling for that preëmption might be decided to be good, and to be placed so as to bind upon it. This doubt, it is said, though now removed, then existed, and would have operated on the mind of the subsequent locator.

The force of this argument will not be denied. But it must also be admitted that it applies with equal strength to the course of artificial reasoning which has governed the decisions of the courts of Kentucky, and on which the titles of the people of that country depend. Subsequent locators must have doubted in what manner any of these questions would be decided. But having been decided, the certainty which they have introduced is carried back to the time when the location was made, and affirms that location.

It has also been said that it is uncertain which side of Johnson's settlement is the east side, and that, in point of fact, the [*229] upper side, or that furthest * from the Blue Licks, faces the east more nearly than any other.

However this fact may be, the court is of opinion that the terms of Johnson's entry designate his east side. His settlement is to lie on the east side of the road. The road, then, in contemplation of the locator, forms the west side, and the side opposite the road must be the east side. The entry must have been so understood by all subsequent locators, and when they call for his east side, the intention to place themselves on the side opposite the road is sufficiently intelligible.

In this, as in other difficulties which occur in the course of the inquiry, it is material to observe that the bill does not charge Taylor's entry to be void for uncertainty. On the contrary it impliedly admits the certainty of his location, and charges that his survey does not conform to it. The real question, then, is not whether Taylor shall be surveyed at all, but where he shall be placed.

The entry of Ambrose Walden, then, will lie on the east side of Johnson's settlement, that is, on the side opposite the road; and, this point being established, the manner in which his land is to be surveyed is free from further doubt. It is to be laid off in a square, the centre of the base line of which is to be the centre of the south-eastern line of Johnson's settlement.

The next entry to be considered is that of John Walden. He enters 1,666⅔ acres joining Ambrose Walden, on the south and south-east, and to run east and south-east for quantity.

Although Ambrose Walden has no south side, yet it is sufficiently apparent that his south-west side was intended by the locator. The

difficulty arises from the subsequent call of the entry to run east and south-east for quantity. A line drawn east from Ambrose Walden's south-western corner would pass *through [* 230] the middle of his land, and a line drawn south-east from the same corner would pass either through or so near his land as to make it almost impossible to suppose that the locator could have intended to make so long and narrow a triangle. The reasonable partiality of Kentucky for rectangular figures must, therefore, decide the shape of John Walden's land, and regulate the manner in which this call of his entry is to be understood. Ambrose Walden's north-western line must be extended to the south, and a line must be drawn due east from his eastern corner, so that a line parallel to his south-eastern line, intersecting a line drawn south-east from the extremity of the north-western line of Ambrose Walden, continued, shall lay off 1,666⅔ acres of land in equal quantities on the southern and south-eastern sides of Ambrose.

It is not to be disguised that there is much difficulty in placing John Walden, but the court can perceive no mode of placing him more conformable to the principles which prevail in Kentucky than that which it has adopted.

We are now brought to Taylor's entry.

On the 22d of May, 1780, John Taylor enters 3,000 acres adjoining John Walden on the north side of Johnson's Fork of Licking, on the east and south-east side, running up and down said creek, and north for quantity, to include an improvement made by Jacob Drennon and Simon Butler.

There is to John Walden's land no east side, nor any side so nearly east as the south-east side. The word side, being in the singular number, and the same side answering, better than any other, both parts of the description, the land must lie on the south-east side.

It is also thought to be the more reasonable construction of the entry that the words, on the north side of Johnson's Fork, refer to the situation of *John Walden's land, not to the [* 231] location of Taylor's. But this is probably not important in the case. Taylor is to lie on the south-east of Walden, to include an improvement made by Drennon and Butler, to run up and down the creek, and north for quantity.

With these calls, it would have been the opinion of the court that Taylor could not cross the creek, had not his entry called for an object on the south side of the creek. That object is the improvement made by Jacob Drennon and Simon Butler.

It has been said that the country was covered with cabins, and that therefore this call was no designation of the land that was loca-

ted. This argument is correct so far as it is urged to prove that this would not be sufficient, as a general description, to enable subsequent locators to say in what part of the country this entry was made. Neither would the letters I. T. marked on a tree answer this purpose. But, when brought into the neighborhood by other parts of the description, these letters serve to ascertain the beginning of the entry under which the claim adversary to that of Taylor is supported. So Taylor informs subsequent locators of the neighborhood in which his land lies, by calling for the south-east side of John Walden's entry, on the north of Johnson's Fork, which is found by a reference to other entries which commence at a point of public notoriety. When brought to the south-east side of John Walden, he is near the cabin called for, and it does not appear that there was, in the neighborhood, any other cabin which this entry could possibly be understood to include. This part of the description, then, will carry Taylor to the south side of Johnson's Fork, and, if permitted to cross that fork, the favorite figure of the square must be resorted to. Against this it is said that, in such a case, the rule of Kentucky will carry him no further than barely to include the object of his call. But this rule cannot apply to this case, because it would give a survey the breadth of which would not be one third of its length.

[* 232] *It is impossible to look at the general plat returned in this case without feeling a conviction that the surveyor considered that fork which, in that plat, is termed Mud-lick Fork, as Johnson's Fork; and there is no testimony in the cause which shows that, when this location was made, that middle stream which runs through Taylor's survey was denominated Johnson's Fork. The finding of the jury, however, that the roads and watercourses are rightly laid down, must induce the opinion that this fact was proved to them.

In a case where the mistake is so obvious, the rule which, under circumstances so doubtful, relative to place, deprives the person, in surveying whose property the mistake has been made, of his legal title, appears to be a severe rule to be adopted in a court of equity. But such is the situation of land titles in Kentucky, that the rule must be inflexible.

Taylor, then, must adjoin John Walden on his south-east side, where that line crosses Johnson's Fork, if it does cross it, and if it does not, then at its south-eastern extremity, which will be nearest Johnson's Fork. If a square formed upon the whole line shall contain less than three thousand acres, then two lines are to be extended due north until, with a line running east and west, the quantity of three thousand acres shall be contained in the whole figure. If such a square shall contain more than three thousand acres, then it is to be

laid off on so much of Walden's line as to contain the exact quantity.

This being the manner in which it appears to the court that Taylor's entry ought to be surveyed, it remains to inquire whether, under the principles which govern a court of equity in affording its aid to an equitable against a legal title, the complainants below ought to recover any, and, if any, what part of the lands surveyed by Taylor, and, if any, what terms are to be imposed upon them.

*The entry as well as patent of Taylor is prior to that [* 233] under which the complainants in the district court assert their title. Of the entries made within their location, therefore, they had that implied notice which gives a court of equity jurisdiction of this cause. They cannot object to the operation of a principle which enables them to come into court. But, in addition to this principle, they must be considered as having notice, in fact, of these locations. The position of the entries of both plaintiffs and defendant is ascertained by calling for certain distances along the same road from the same object. Crutcher and Tibbs, therefore, when they made their location, knew well that they included the Waldens and Taylor, and that their entry could give them no pretensions to the lands previously entered by those persons. If, by any inadvertence, the Waldens and Taylor have surveyed land to which Crutcher and Tibbs were entitled, and have left to Crutcher and Tibbs land to which the Waldens and Taylor were entitled, it would seem to the court to furnish no equity to Crutcher and Tibbs against the legal title which is held by their adversaries, unless they will submit to the condition of restoring the lands they have gained by the inadvertence of which they complain.

The court does not liken this inadvertent survey of lands, not within the location, to withdrawing of the warrant and reëntering it in another place. The latter is the act of the mind intentionally abandoning an entry once made; the former is no act of the mind, and so far from evidencing an intention to abandon, discovers an intention to adhere to the appropriation once made. Although their legal effect may be the same, yet they are not the same with a person who has gained by the inadvertence, and applies to a court of equity to increase that gain.

Was this, then, a case of the first impression, the court would strongly incline to the opinion *that Bodley and [* 234] Hughes ought not to receive a conveyance for the lands within Taylor's survey, and not within his entry, but on the condition of their consenting to convey to him the lands they hold which were within his entry and are not included in his survey. But this

is not a case of the first impression. The court is compelled to believe that the principle is really settled in a manner different from that which this court would deem correct. It is impossible to say how many titles might be shaken by shaking the principle. The very extraordinary state of land title in that country has compelled its judges, in a series of decisions, to rear up an artificial pile from which no piece can be taken, by hands not intimately acquainted with the building, without endangering the structure, and producing a mischief to those holding under it, the extent of which may not be perceived. The rule as adopted must be pursued.

Taylor, then, must be surveyed according to the principles laid down in this decree, and must convey to the plaintiffs below the lands lying within his patent and theirs, which were not within his entry.

5 C. 234; 5 P. 190; 6 P. 291; 14 P. 156; 15 P. 93; 9 H. 34.

TAYLOR AND QUARLES *v.* BROWN.

5 C. 234.

The certificate of the surveyor that a survey has been made by virtue of a warrant, is sufficient evidence that the warrant was in his possession when the survey was made.

Under the land law of Virginia the title, if it commence without an entry, begins with the survey, and is not lost by the neglect of the surveyor to record the survey, pursuant to the direction of the act of 1748.

The principal surveyor may make a legal return of a survey, from the field notes of his assistant who made the survey, and died before making a plat and certificate.

A survey, though it include surplus land, is an appropriation of the land it covers, and cannot be reduced by a *caveat*, under the act of Virginia of 1779. The patent relates in equity to the inception of the title, and he, who has first appropriated the land, has the best equitable title, unless impaired by the circumstances of the case.

A locator under a warrant, undertakes to find vacant land, and acts at his own risk.

The equity of the prior locator in Virginia extends to the surplus land surveyed, as well as to that included in the warrant.

ERROR to the district court of the United States for the Kentucky district, in a suit in chancery, wherein Taylor and Quarles were complainants against Brown. The bill of the complainants was dismissed by the court below.

Both parties claimed under military warrants upon the king's proclamation, for services rendered prior to the year 1763.

The complainants claimed under a warrant in favor of Angus

M'Donald, for 2,000 acres issued *the 5th of February, [*235] 1774. The defendant claimed under a warrant in favor of Jethro Sumner, for 2,000 acres, issued the 3d of December, 1773. M'Donald's survey was made on the 7th of July, 1774. Sumner's was made on the 24th of June, 1775, and he obtained a patent on the 5th of January, 1780. The patent upon M'Donald's survey, was not issued until the 10th of January, 1792; so that the complainants had a younger warrant and patent, but the elder survey. The defendant had the elder warrant and patent, but the younger survey. M'Donald's survey included 3,025 acres; Sumner's included, 2,576 acres. The quantity covered by both surveys was 1,080 acres, of which Taylor claimed 660, and Quarles 200; it did not appear who claimed the other 220 acres, included in the interference.

M'Donald's survey was made by Hancock Taylor, an assistant surveyor of Fincastle county, where the lands lay, who, before his return to the office, was killed by the Indians on the last of July, 1774, but his field-books and papers were preserved by his attendants, and delivered to the principal surveyor of the county, in September, 1774, who made out a plat therefrom.

The complainants' bill charges, that the survey of Sumner was fraudulently made, so as to interfere with M'Donald's. The answer denies the fraud; and there was no evidence of fraud, or even of notice on the part of Sumner.

P. B. Key and *Rowan*, for the complainants.

Pope and *Swann*, for the respondent.

* MARSHALL, C. J., delivered the opinion of the court. [*241] In this case the title of both parties originates in surveys made by the surveyor of Fincastle county, previous to the passage of the land law of Virginia. Both surveys were made on military warrants issued under the proclamation of 1763. The survey under which the plaintiffs claim, being prior in point of time, they have the first equitable title, and must prevail, unless the objections made to that survey be valid, or unless their equity is defeated by the circumstances of the case.

Several objections have been made to the survey, each of which will be considered.

1. It is said that the warrant was not in possession of the principal surveyor when the survey was made.

* The answer given to this objection is conclusive. The [*242] warrant is an authority to, and an injunction on, the sur-

veyor to lay off 2,000 acres of vacant land which had not been surveyed by order of council, and patented subsequent to the proclamation. Whether acts under this authority are valid or void, if the authority itself be not in possession of the officer, is perfectly unimportant in this case; because the court considers the certificate of the surveyor as sufficient evidence that the warrant was in his possession, if, in point of law, it was necessary that it should be lodged in the office. That certificate is in the usual form, and states the survey to have been made by virtue of the governor's warrant, and agreeably to his majesty's royal proclamation.

2. The second objection is, that the survey does not appear to have been recorded within two months after it was made.

The opinion, that this omission on the part of the surveyor avoids the title which accrued under the survey, is founded on the 6th section of an act passed in the year 1748, entitled, "An act directing the duty of surveyors of land." In prescribing this duty the law, among other things, enjoins the surveyor "to enter, or cause to be entered in a book well bound, to be ordered and provided by the court of his county, a true, correct and fair copy and plat of every survey by him made during his continuance in office, within two months after making the same."

This section is merely directory to the surveyor. It does not make the validity of the survey dependent on its being recorded, nor does it give the proprietor any right to control the conduct of the surveyor in this respect. His title, where it can commence without an entry, begins with the survey; and it would be unreasonable to deprive him of that title by the subsequent neglect of an officer, not appointed by himself, in not performing an act which the law does not
[*243] pronounce necessary to his title, *the performance of which he has not the means of coercing.

If the omission to record the survey in two months would avoid it, then, the omission of any other act enjoined by the same section would equally avoid it. The surveyor is directed to see the land "plainly bounded by natural bounds, or marked trees." Has his conforming to this direction ever been inquired into, in a contest respecting the validity of a survey? Would any gentleman of the bar contend that the land was not plainly bounded, and that, for this reason, a survey actually made was void? He is, within five months to deliver to his employer a plat and certificate. Suppose six months should elapse before he complies with this duty, is the survey void? He is to certify the true quantity of land contained in the survey. Would the gentlemen from Kentucky be willing to adopt it as a principle that every survey expressing a quantity more or less than

the true quantity is absolutely void? He is to state the water-courses, and also the plantations next adjoining. Should any one of these be omitted, is the survey void? He is to return a list of surveys in the month of June annually to the clerk's office. Should he fail in this, are the surveys void? On these points it is impossible seriously to insist; and the court can perceive no distinction between them. They are all merely directory to the officer, and none of them affect a title which commenced before they are to be performed. He is subjected to a penalty for failing in any one of these duties, but his performing or omitting them is unimportant to the rights of those for whom surveys have been made.

3. The third objection is of more weight. It is, that the survey must be certified by the person who made it, and can be authenticated in no other manner.

That, in point of fact, this survey was certified as made, is not doubted. But it is said that the * plat and certi- [*244] ficate want those appropriate forms which alone the law will receive as evidence of their verity.

This survey was made by Hancock Taylor, assistant surveyor of Fincastle county, from whose field-notes the plat and certificate were made out by his principal, who also signed them. Hancock Taylor was prevented from performing this duty by a mortal wound received from the Indians. It is understood to be usual for the assistant, where surveys are actually made by him, to sign the plat and certificate, which are also signed by his principal.

The 46th section of the act, "for settling the titles and bounds of lands, and for preventing unlawful hunting and ranging," enacts, "that every survey of lands intended to be patented shall be made and returned by a sworn surveyor duly commissioned for that purpose."

Let us inquire whether, under this section, the plat and certificate must be made out by the person who made the survey, and whether a survey actually made by an assistant must be platted and certified by him.

It may be of some importance, in the construction of this section, to inquire whether the return alluded to is to the office of the principal surveyor, or to the land-office, out of which the patent is to issue.

In construing this section, the accompanying sections afford us no aid. But the general object of the act, and the allusion to patenting which is made in the section, would lead to the opinion that returns to the land-office were in contemplation of the legislature. If we examine the laws generally, we shall find that most usually the

word "surveyor" is applied to the principal, and where the law alludes to the assistant, he is designated by the term "assistant surveyor." If the return directed by this section is to be made
[*245] to the land-office, for the purpose * of obtaining a patent, then the principal surveyor is the person who is to certify it, and a survey actually run by himself, or by his assistant, is to be considered, in law, as a survey made by himself. It is believed to be most usual for the plat and certificate returned to the land-office, to be signed by the principal and by his assistant; but this section seems not to require both. The signature of the assistant is the justification to the principal for recording and certifying the survey, and is the best testimony that it has been made; but the law does not require, in terms, that where that best testimony is unattainable, no other shall be received. So far as the section which has been recited goes, the signature of the principal surveyor sufficiently authenticated this plat, and that a patent has issued upon it, is proof that such was the opinion entertained in the land-office. A patent certainly does not issue of course, unless the papers on which it issues be regular. A plat not legally authenticated is no plat, and the register cannot justify issuing a patent on it.

This consideration certainly deserves some weight; but if the court inspect this section, it seems, in fair construction, to require only the signature of the principal surveyor, who, consequently, judges, in the first instance, of the testimony which will enable him to certify a survey. If the signature of the assistant can be dispensed with, then other testimony than his signature may authorize the principal to certify a survey; and if, in any possible case, other testimony can be deemed competent, it surely may in this.

If the return directed by this section be understood to be a return to the office of the principal surveyor, it is necessary to inquire what it is that the section exacts. It is, that the "survey shall be made and returned by a sworn surveyor," not that the plat shall be made out and certified to the principal by the assistant who run the lines.
The courses and distances contained in the field-book of the
[*246] assistant, represent to the principal as correctly * and as intelligibly the survey actually made, as the plat and certificate could do. From these data he is as capable of placing on his record book a correct plat, and of returning that plat to the land-office, as if the lines of the survey had been placed on paper by the assistant himself. It would seem reasonable, therefore, even on this construction of the section, in the actual case where death has disabled the assistant from platting his works, to consider the law as satisfied by the delivery of those works to the principal surveyor.

The "act directing the duty of surveyors of land" does not appear to this court to contain any provisions which are opposed to the construction here made of the preceding act of the same session. The 6th section of that act, which has been particularly referred to by counsel, prescribes the duty of surveyors, but contains no direction respecting the signature of plats and certificates, except this: "Every surveyor making a survey of land shall see the same plainly bounded by natural bounds, or marked trees, and within five months after survey, shall deliver to his employer a plat and certificate thereof."

It has never been understood that this plat and certificate may not be delivered by the principal; and other parts of this section show that the duties enjoined, are some of them to be performed by the principal. The section proceeds to say, "and shall also enter, or cause to be entered, in a book well bound, to be provided by the court of his county, a true, correct, and fair copy and plat of every survey by him made." Now this book is the book of the principal. It is, of course, his duty to superintend the entries in it. They are to be "of the surveys by him made." The survey made by the assistant, is, then, to be entered by the principal as a survey by him made. He is also to return annually a list of the surveys by him made, to the county court clerk's office. This return is made by the principal. Certainly the list must include all the surveys made by his assistants. They are also considered as made [*247] by him. Upon a view of the whole section, the court perceives nothing in it which renders it improper for the principal to plat and certify a survey made by his assistant whose field-notes are returned complete to him, and who has been disabled by death from making the plat himself.

This construction is very much strengthened by the terms of the act of 1779. That act declares "that all surveys of waste and unappropriated land made upon any of the western waters before the 1st day of January, 1778," "by any county surveyor, commissioned by the masters of William and Mary College, acting in conformity to the laws and rules of government then in force, and founded either upon charter," &c., "or upon any warrant from the governor for the time being, for military service, in virtue of a proclamation either from the king of Great Britain, or any former governor of Virginia, shall be and are hereby declared good and valid; but that all surveys of waste and unpatented lands made by any other person, or upon any other pretence whatsoever, shall be and are hereby declared null and void."

Notwithstanding this declaration, we find that patents have actually issued, under which both parties in this cause claim, on surveys

made not by the county surveyor in person, but by his assistant. It is perfectly well known that a great proportion of the surveys recognized by this act have been really executed by assistant surveyors. Upon what principle of construction are they brought within the act? Clearly upon this. The law, so far as respects the validity of the survey, considers the act of the deputy as the act of his principal. A survey made by an assistant is, in law language, made by the principal. And if this idea be taken up on so material a clause as that which confirms or invalidates every survey previously made, and which is expressed in terms much more explicit and decisive [*248] than any of the clauses in the preceding acts, must * not the idea be carried throughout? Must not the survey, in all cases, be considered in a legal point of view as made by the principal through the agency of his deputy, and must not this principle be kept in view in construing the laws upon the subject?

This survey, then, is, in law language, made by William Preston. It is confirmed as a survey made by him. The law recognizes it as his survey. Assuredly, then, his certificate may authenticate it.

The act proceeds to say that "all and every person or persons, his, her, or their heirs, claiming lands upon any of the before recited rights, and under surveys made as herein before mentioned, (that is, by a county surveyor,) against which no *caveat* shall have been legally entered, shall, upon the plats and certificates of such surveys being returned into the land-office, together with the rights, &c. upon which they were respectively founded, be entitled to a grant for the same."

To the court it seems clear that the law authorizes a plat and certificate of survey from the person whom it contemplates as the maker of that survey; that is, from the county surveyor. The formal requisites of the law are complied with by a plat and certificate under his signature. He has given it, in this case, on testimony, which the court deems as full and complete as even the plat certified by the assistant who made the survey would have been.

These are the objections which have been made to the survey under which the plaintiffs claim. After bestowing on them the utmost attention, the court is decidedly of opinion, that the survey of M'Donald was and ought to be considered as a good and valid survey.

4. The 4th objection to the plaintiffs' claim is founded on their negligence.

[*249] * At law, this objection is clearly of no validity. The proviso to that section of the act of 1779, which has been considered, declares that such surveys shall be returned to the land-office within twelve months after the expiration of that session of

assembly, or should become void. The time for returning them, however, was prolonged until this patent issued. Consequently, a *caveat* to prevent the emanation of the patent, because the survey was not returned in time, could not have been maintained. If the survey of M'Donald came within the law, the circumstance, that the subsequent survey of Sumner was made without notice in fact, cannot alter the case. His warrant only authorized him to acquire vacant land, and he took upon himself to find lands of that description. The principle, *caveat emptor*, is directly applicable.

5. The 5th objection made by the defendant is, that the patent of the plaintiffs contains surplus land. The warrant, it is said, was an authority to survey only 2,000 acres, and, for the surplus, the survey was made without authority.

It is a fact of universal notoriety in Virginia not only that the old military surveys, but that the old patents of that country generally contain a greater quantity of land than the patents call for. The ancient law of Virginia notices this fact, and provides for the case. It prescribes the manner in which this surplus may be acquired by other persons; and it is worthy of notice that the patentee must himself reject the surplus before it can be acquired by another, and, after having so rejected it, he has the election to allot it in such part of his patent as he pleases.

It is contended, however, that although a grant containing surplus land might give a legal right to such surplus, yet a survey could not be carried into grant so far as such surplus appeared upon a *caveat*.

* On this subject we find no act of Virginia under the re- [*250] gal government. At that time the governor and council constituted a branch of the legislature and the general court of the colony. They also held a district court in the council chamber for the trial of *caveats*, their decisions on which were regulated by rules established by themselves. These rules, it is believed, are lost; and it is also believed that the means of ascertaining satisfactorily what they were, are no longer attainable. The land law of 1779 was framed by men who understood them, and it is not unreasonable to suppose that, in drawing that law, some respect was paid to them. That law gives a *caveat* against a survey not returned to the land-office within twelve months after it is made, or whose breadth shall not be one third of its length, but gives no *caveat* on account of surplus land contained in a survey, nor does it indicate the idea that, on a survey containing such surplus, a *caveat* could not be supported. If such survey is not absolutely void for the whole, the difficulty of assigning the exact quantity is sufficient to have induced legislative

regulation, had it been contemplated as the subject of a *caveat*. It would seem that, for security in this respect, the government trusted to the oaths prescribed for surveyors and chain-carriers. It is also worthy of remark, that the law of 1779 superadds to the restrictions formerly imposed on taking up surplus lands contained in any patent, that it can only be done during the life of the original patentee, and before any alienation has been made.

It is also to be observed, that the act of 1779 confirms this survey, and it is understood that no previous entry was deemed necessary to its validity. The entries made on treasury warrants are most frequently in such terms that a survey for a greater quantity of land might be considered as being so far contrary to location, and might be restrained by the location; but, where there is no entry, the difficulty of restraining the survey is much increased, because there exists no standard by which to reduce it. There is, indeed, a [*251] standard as to quantity, but *not as to form and place. The survey is an appropriation of a certain quantity of land by metes and bounds, plainly marked by an officer appointed by the government for that purpose, and it would seem that the government receives his plat and certificate as full evidence of the correctness of the survey. This being the case, it is admitted by the government to be an appropriation of the land it covers, and it is difficult to discern a rule by which the survey could be reduced on a *caveat* by the owner of an interfering survey, unless the entry on which it was made was in such terms that the excess might be considered as surveyed contrary to location. For to every and to each part of the land surveyed, its owner has an equal right.

Whatever rules might have been established in the tribunal having jurisdiction of the subject, under the regal government, the *caveat* in this cause, had one been entered, must have been regulated by the act of 1779. That act gives validity to both surveys; and although it directs *caveats* depending in the council chamber, at the commencement of the Revolution, to be transferred to the general court, and to be tried by the rules which governed when they were entered, it subjects future *caveats* to the law then introduced. Under this law, as has already been stated, the court can perceive but one principle on which a survey can be reduced on a *caveat*, and that principle is inapplicable to this case.

In conformity with this opinion is that of the judges of Kentucky. Not a case exists, so far as the court is informed, in which, on a *caveat*, the quantity of land in the survey of plaintiff or defendant has been considered as affecting the title, upon the single principle of surplus. Yet the fact must have often occurred. And in the case

of Beckly *v.* Bryan and Ransdale, (Sneed's Kentucky Cases, 107,) the contrary principle is expressly laid down. In that cause the court said, "It is proper to premise that there is but one species of cases in which any court of justice is authorized by our land law to devest the owner of a *survey of the surplus [*252] included within its boundaries; namely, where the survey was made posterior to an entry made by another person on the same land; and to do more would be unequal and unjust, inasmuch as a survey which is too small cannot be enlarged.

This position, it is true, was laid down in a contest between a military survey and a patent on a treasury warrant. But it is laid down in terms equally applicable to a contest between two military surveys; and the court does not understand that the law has ever been otherwise understood in Kentucky.

The opinions delivered by the judges of appeals of Virginia in the case of Johnson *v.* Buffington, 2 Wash. 116, would incline this court very much to the opinion that the same rule prevailed in the council chamber before the Revolution. In that case, under a warrant from Lord Fairfax for 300 acres of land, 450 acres had been surveyed, and the excess appeared on the plat. This survey had lain in the office many years, and was clearly forfeitable; but Lord Fairfax had not taken advantage of the forfeiture. After his death a patent issued on a subsequent entry and survey, and the patentee was decreed to convey to the person claiming under the prior entry. In delivering his opinion Judge Fleming said, "The first objection made by the counsel for the appellant is, that the survey does not pursue the warrant; but I think there is no weight in this, as the variance is only in the quantity. If the land had been imperfectly described, it might have been fatal."

Carrington, J., said, "He did not consider the variance between the warrant and survey, as to the quantity, as being of any consequence."

The President, who had been an eminent practitioner in the council chamber, said, "He felt no *difficulty about the [*253] variance in the quantity of the land."

The rules established by Lord Fairfax were known to conform to those of the crown, and the declarations of the judges in this case, all of whom were acquainted, in some degree, with the usages under the regal government, make a strong impression on this court in favor of the opinion that, in the council chamber, the law was understood to be, that excess in the survey was not to be regarded.

The law of this case, then, so far as respects the state of title previous to the emanation of either grant, appears to be with the first

survey. It remains to inquire whether a court of equity will relieve against the legal title acquired by the first grant.

The principle on which relief is granted is, that the patent, which is the consummation of title, does, in equity, relate to the inception of title; and, therefore, in a court of equity, the person who has first appropriated the land in contest has the best title, unless his equity is impaired by the circumstances of the case.

In this cause, the first patentee is said to be a purchaser without notice. But, for the reasons assigned in a former part of this opinion, the court does not consider him as clothed with that character. His warrant authorizes him to survey waste and unappropriated lands, and he undertakes himself to find lands of that description. The government acts entirely on his information; and the terms of his grant are, that the lands were waste and unappropriated. It is not for him to say that he had misinformed the government, and had surveyed appropriated instead of vacant lands, and had thereby entitled himself to be considered as a purchaser without notice.

[*254] Neither does the court conceive that the plaintiffs *have forfeited their right to come into a court of equity, by their negligence.

In the case of 1 Wash. 116, the prior right of the plaintiff had been absolutely forfeited, so that the defendant had the first title both in equity and law, and the plaintiff's bill was dismissed because he failed to prove the fraud which he alleged, and which was, in that case, necessary to give the court jurisdiction.

In the case of Picket and Dowdale, (2 Wash. 106,) and of Currie and Burns, (2 Wash. 121,) there were both forfeiture and abandonment.

In the case of Johnson and Brown, 3 Call. 259, more than sufficient time had elapsed between the entry and survey of the plaintiff to produce a forfeiture; but, by the old law, notice was to be given by the surveyor before a forfeiture could take place, and this fact was not proved. During forty years this entry had been totally neglected; and the court was of opinion that, after such a lapse of time, the fact of notice by the surveyor might be presumed. This case then also turned on the principle of forfeiture. There were, besides, a great many circumstances in Johnson's title which gave a strong bias to the judgment of the court.

The difference between the case under consideration, and those cited is apparent. But the case of Johnson *v.* Buffington was much stronger than this. The prior survey was actually forfeitable, but had not been forfeited; and in that case, after a much longer time than

exists in the present, a court of equity supported it against the eldest grant.

The general principles which have been relied on, in this branch of the argument, cannot be considered as applicable to a case in which the act, which constitutes the foundation of the charge of negligence, was performed within the time allowed by statute *for its performance. The circumstances, which ex- [*255] cused the owners of military surveys for not returning them, were before the legislature and have been declared, by law, to be sufficient.

But it is contended, that the plaintiffs can have no equity beyond the 2,000 acres contained in the warrant on which M'Donald's survey was made.

If this court is to consider itself as merely substituted for a court of law, with no other difference than the power of going beyond the patent, this question is already decided. But, in the case of Bodley and Hughes *v.* Taylor, an opinion was indicated that its jurisdiction, not being given by statute, but assumed by itself, must be exercised upon the known principles of equity. This opinion is still thought perfectly correct in itself. Its application to particular cases, and indeed its being considered as a rule of decision on Kentucky titles, will depend very much on the decisions of that country. For, in questions respecting title to real estate especially, the same rule ought certainly to prevail in both courts.

But, in its equity, this case differs essentially from Bodley and Hughes *v.* Taylor. In that case, Taylor had the eldest entry as well as the eldest patent. In this, the eldest equitable right is with him who holds the eldest[1] grant. In that case, the variance between the entry and survey of the elder right is established by a set of rules growing out of expositions subsequent to the survey. In this, the eldest grant is founded on a survey made on land, which, in point of fact, was previously appropriated. But, which is of great importance, in that case, the terms of the subsequent location prove that the locator considered himself as comprehending Taylor's previous entry within his location, and, consequently, did not suppose so much of the land covered by his entry as being then subject to appropriation. *He either did not mean to acquire the land [*256] within Taylor's entry, or he is to be considered as a man watching for the accidental mistakes of others, and preparing to take advantage of them. What is gained at law by a person of this description, equity will not take from him; but it does not follow

[1] *Qu.*, youngest?

that equity will aid his views, and give more than the law gives him, by allowing him to hold what he has legally gained, while he demands what is legally lost.

In this case, M'Donald supposed himself to be appropriating, and in fact was appropriating, land to which no other had, at the time, any pretensions.

In addition to these strong differences, in equity, between the two cases, no decision of Kentucky was shown to the court, which was applicable to the case of Bodley and Hughes *v.* Taylor. But the case of Beckly *v.* Bryan and Ransdale is conceived to be an authority in point for this case. The decision of the court of appeals of Virginia, in the case of Buffington and Johnson, is also considered as expressly in point, and is to be respected, because both these surveys were made while the country in which they were made formed a part of Virginia.

It is thought not absolutely unimportant, in a court of equity, that one of the circumstances has occurred, which, at law, rescues the surplus land in M'Donald's patent from the possibility of being acquired by any other person. An alienation has taken place. The decree, therefore, of the court for the district of Kentucky, is to be reversed, and the defendant must be decreed to release to the plaintiffs, respectively, the lands within Sumner's patent which lie within the lines of the land conveyed by M'Donald's heirs to them respectively.

3 W. 597; 3 P. 320; 6 P. 291.

[*257] *THE UNITED STATES *v.* JOHN ARTHUR and ROBERT PATTERSON.

5 C. 257.

A plea of performance of the condition of a bond, without oyer, is bad on demurrer.

ERROR to the district court of the United States for the district of Kentucky, in an action of debt upon a bond. The declaration did not set out the condition of the bond. Without craving oyer, the defendants pleaded performance of the condition of the bond. The plaintiffs replied, that the condition was broken and assigned several breaches, among which was, that John Arthur, as collector of the internal revenue, failed to pay over duties, which, by law, he was

bound to collect. The defendants demurred specially to this replication, assigning for cause, that if the breach were sufficient, the defendants would be liable for duties due within the district, whether the same were, or could be collected, or not.

Rodney, attorney-general, for the United States.

Pope, for the defendants.

*MARSHALL, C. J., delivered the opinion of the court, to [*261] the following effect:

If this case depended upon the replication, the judgment of the court must be in favor of the defendants. It is certainly bad, inasmuch as it charges the defendants with moneys not collected. But upon a demurrer the judgment is to be against the party who committed the first error in pleading.

The want of oyer is a fatal defect in the plea of the defendants; and the court cannot look at any subsequent proceeding. The plea was bad when pleaded. The judgment must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

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*HEPBURN and DUNDAS, Plaintiffs in Error, *v.* COLIN AULD, [*262] Defendant in Error; and HEPBURN and DUNDAS, Appellants, *v.* COLIN AULD, Appellee.

5 C. 262.

After a long possession in severalty, a deed of partition may be presumed.

In equity, time may be dispensed with if it be not of the essence of the contract.

A vendor may compel a specific execution of a contract for the sale of land, if he is able to give a good title at the time of the decree, although he had not a good title at the time when, by the contract, the land ought to have been conveyed.

But a court of equity will not compel a specific performance by the vendee, unless the vendor can make a good title to all the land contracted to be sold, or it is a fit case for compensation.

THE first of these cases was a writ of error to the judgment of the circuit court of the District of Columbia, in an action of debt at common law brought by Auld, agent and attorney, in fact, for Dunlop & Co., against Hepburn and Dundas for $45,000, the penalty of the same articles of agreement which are recited in the case of Hepburn and Dundas *v.* Auld, 1 C. 321.

The second of these cases was an appeal from a decree of the

same court, dismissing the bill in equity brought by Hepburn and Dundas against Colin Auld, to compel him to accept the land, and pay the difference between the agreed value of the land and the award.

The questions in the two cases being substantially the same, they were heard and argued together.

The breaches assigned in the declaration, in the action of debt by Auld were, that Hepburn and Dundas did not, on the 2d of January, 1800, pay the amount of the award in cash, nor bills of exchange, and did not on that day assign and transfer to Auld, the contract of Graham, with full powers, &c.

Hepburn and Dundas pleaded a tender of the assignment of Graham's contract in three different pleas, the pleadings upon which ended in demurrers. The first raised the question, whether Auld was obliged to accept a deed of assignment, the preamble of which stated a part of the consideration of the assignment to be "a full [*263] acquittance and discharge *of all the claims and demands of the said John Dunlop & Co. against them being made and executed by the said Colin Auld." The other two demurrers brought into view the title of Hepburn and Dundas to the land sold to Graham.

The bill of Hepburn and Dundas alleges that the agreement by Auld to accept an assignment of Graham's contract towards the discharge of the debt due from them to Dunlop & Co., and to give an acquittance and discharge of that debt, and of all demands, was the inducement for them to submit the accounts to arbitration. It also states the acts and letters of Auld subsequent to the tender, to show that he considered himself bound to accept the assignment. That on the 27th of June, 1801, after recovering judgment in ejectment against Graham's heirs, Hepburn and Dundas offered to make him a deed for the land, but he refused to accept it.

The answer of Auld denies that he was bound to accept an assignment of Graham's contract which should bind him to give an acquittance and discharge of all demands of Dunlop & Co. against Hepburn and Dundas. He endeavors to explain his conduct and letters subsequent to the tender by saying that he was induced to do it by the representations of Hepburn and Dundas that it was necessary, and that the money due to them by Graham might be sooner recovered, or raised, by sale of the land, than by any contest at law relative to the transaction of the 2d of January, 1800. He denies that he ever considered the tender as good, but was willing to cooperate with them in bringing to an end the suit with Graham, until which time it would be doubtful whether a sufficient title in fee-simple could be obtained from them.

He avers that the compromise made with Graham's heirs was without his consent, and may be set aside when they come of age.

He says the offer of a deed on the 27th of June, 1801, was after he had brought suit against them *upon the award, [* 264] and when it was apparent that their title was bad, or at all events doubtful.

In an amended answer, he states that he had requested them to exhibit to him their title papers, which they refused to do; and requires that they should produce them in court. He avers his belief that their title is defective.

Hepburn and Dundas filed a supplemental bill which states their title. It avers possession ever since 1773, and refers to certain title papers; they say that they verily believe their title to be good, and never heard a doubt till long after the tender of the assignment; that as soon as the objections were made known they took pains to remove them, and have lately obtained deeds of confirmation from the surviving patentees. That the title of Sarah, one of the co-devisees of John West, after her death in 1795, descended upon her brothers Thomas, John, and Hugh, and her sister Catharine, and that John, Hugh, and Catharine have lately confirmed their title, and refer to the deeds; and they suppose that Thomas had passed all his title to Sarah's part by a deed executed before her death.

The title which they show in their supplemental bill is as follows, namely:

The 6,000 acres were included in a patent for 51,302 acres of land, granted on the 15th of December, 1772, by the State of Virginia to George Muse, Adam Stephen, Andrew Lewis, Peter Hog, John West, John Polson, and Andrew Waggoner. This tract of 51,302 acres was in 1773 divided between the patentees who have occupied in severalty ever since. One of the shares containing 6,000 acres, was allotted to John West, who died seized thereof, and devised all his Ohio lands to be equally divided among his children Thomas, John, Hugh, Catharine, Sarah, and Francina, excepting that Hugh was to have 1,000 acres more than any of the other children. The testator had but two tracts on the waters of the *Ohio, [* 265] namely, that of 6,000 acres on the banks of the Ohio, and one of 1,400 acres on Pokitallico Creek. The devisees made a partition among themselves; Francina's 1,000 acres were allotted to her out of the 1,400 acres on Pokitallico Creek, and she, and those claiming under her, have ever since held and enjoyed the same exclusively.

The tract of 6,000 was divided between the others; Hugh having 2,000, and the other four having 1,000 each.

Thomas, by deed of 20th of May, 1788, conveyed his 1,000 acres to Hepburn and Dundas.

John, by deed of 21st of February, 1790, also conveyed his 1,000 acres, in which deed Thomas was a party.

Hugh, also, by deed of 24th of April, 1788, conveyed his 2,000 acres.

Catharine intermarried with Baldwin Dade, who, with her and Thomas West, by deed of 20th of June, 1788, conveyed to Hepburn and Dundas her 1,000 acres.

Sarah intermarried with John Bronaugh, who, with her and Thomas West, conveyed to Hepburn and Dundas her 1,000 acres, by deed of 21st of February, 1790.

Thomas, also, by deed of 25th of April, 1788, quitclaimed to Hepburn and Dundas the 2,000 acres conveyed by Hugh.

By virtue of these deeds Hepburn and Dundas aver that they were seized of the 6,000 acres, and so continued seized and possessed until the contract with Graham.

They then proceed to answer some objections to their title [* 266] which had been suggested by Auld. * They say he had objected that the original patentees were joint-tenants, and that it does not appear that partition was made among them by deed.

To this they answer, first, that after such a lapse of time a deed ought to be presumed. And, secondly, that upon inquiry they found that George Muse, Andrew Lewis, and Peter Hog, died before 1787; that Adam Stephen died since 1787, and Andrew Waggoner and John Polson were still alive, who made deeds of confirmation to Hepburn and Dundas. That they also obtained a like deed from the residuary devisee of Adam Stephen.

They also state that Auld had objected, that the partition between the devisees of John West, not being by deed, was not valid; and that Francina, although she had consented to take her thousand acres on Pokitallico Creek, might yet claim a share of the 6,000 acres.

To this they answer, that a parol partition among the devisees was valid.

They state that it was further objected by Auld, that Sarah Bronaugh had never duly conveyed her 1,000 acres to Hepburn and Dundas, and that she was not privily examined according to the laws of Virginia.

To this they answer, that they believe she was privily examined, but the commission is lost or mislaid so that they cannot find it. And further that Sarah Bronaugh died in 1795, without issue; and Francina, who had intermarried with Charles Turner, died without issue

in 1796, and her husband in 1802, by which deaths the interest of those ladies in the 6,000 acres, if any they had, devolved upon their brothers Thomas, John, and Hugh, and their sister Catharine Dade, whereupon Hepburn and Dundas obtained from John and Hugh, and Baldwin Dade and Catharine Dade, deeds of confirmation as to the shares of Sarah and Francina. They did not get such a deed from Thomas, because he * had before conveyed to [* 267] them his interest in those lands.

Auld's answer to the supplemental bill, denies that any division ever took place between the devisees of John West, under his will, and avers that Francina always refused to sell her interest in the Ohio lands to Hepburn and Dundas, and that it was settled upon her husband, Charles Turner, who died leaving two children by a second marriage.

That the interest of Sarah Bronaugh never passed from her to Hepburn and Dundas, for want of her privy examination.

That the deeds from Hugh West and Thomas West, were not recorded within the eight months, so as to be valid against creditors or subsequent purchasers without notice. That Thomas was embarrassed in his circumstances for many years previous to his death, and there are still debts due from him by bonds and judgments, which bind any lands which descended to him from his sisters Sarah and Francina.

* MARSHALL, C. J., delivered the opinion of the court, as [* 270] follows, namely:

By the agreement of the 27th of September, 1799, the plaintiffs bound themselves, in the event of not paying, on the 2d of January, in bills of exchange, or money, the amount of the award to be rendered between the parties, to assign and transfer, on that day, to the defendant, a contract they had made with Graham, by which they had sold to him a tract of land containing 6,000 acres for the sum of $18,000, * payable at different times, with inte- [* 271] rest. They also bound themselves to execute an irrevocable power of attorney enabling the defendant, in their names, to recover the possession of the land, or to enforce the payment of the purchase-money, at his election.

The defendant covenanted to accept this assignment, towards the discharge of the award, and, if it should exceed the amount thereof, to pay the excess.

On the part of the defendant it has been contended that this assignment was to be received as security for, and not as payment of, the debt due to Dunlop & Co. But on this point it is impossible to entertain a doubt. The contract itself is conclusive. The word "to-

wards" was obviously introduced because, the award not being then made, it was uncertain whether the assignment would completely discharge its amount. But the words of the agreement admit of no other construction than that it was to be received either in part or in full payment, as the sum awarded might be of greater or less amount than the stipulated value of the contract to be assigned. All the testimony connected with the agreement of September, 1799, tends to confirm this construction.

The next inquiry respects the transactions of the 2d of January, 1800. The plaintiffs insist, and the defendant denies, that the tender made by Hepburn and Dundas on that day was a legal offer to do what they had covenanted to perform.

The efficacy of the assignment itself is not questioned; but it is contended on the part of the defendant that the instrument is vitiated by the clause which is introduced into it, reciting, as a part of the consideration on which it was made, that a release of all claims and demands whatsoever, on the part of John Dunlop & Co., against them, had been given.

[*272] *The contract of September, 1799, certainly does not, in terms, stipulate for such a release; and if this recital in the deed of assignment could possibly prejudice John Dunlop & Co., that circumstance would unquestionably invalidate the tender. But if it should be deemed an unimportant recital, then the tender is a substantial performance of the contract, so far as it was to be performed on the 2d of January, 1800, and at least imposed on Colin Auld the duty of preparing an unexceptionable deed, and demanding its execution.

It has already been stated that, under the agreement of September, 1799, the assignment of Graham's contract was to be received in payment, and consequently that assignment, accompanied with a proper power of attorney, would discharge the award as fully as a payment in bills of exchange or money. Had the deed, therefore, limited its recital to a discharge of all claims and demands under the award, it would have been strictly correct; for to such a discharge Hepburn and Dundas were entitled. The deed of assignment, properly executed and received, and the power of attorney, would, in law, have been a full payment of the award; and the subsequent claims of John Dunlop & Co. would grow out of the agreement of September, 1799.

The inquiry, whether the general terms of the recital affords any substantial objection to the deed, produces two questions.

1. Could John Dunlop & Co. have had any other claims and demands on Hepburn and Dundas than were comprehended in this award.

2. Would this recital in the deed of assignment impair those claims which grew out of the agreement?

1. The papers themselves sufficiently show that every claim whatever of John Dunlop & Co., on Hepburn and Dundas, was settled in the award. The *general complexion of the [*273] agreement of September, 1799, proves this; but the particular stipulation to give "a full receipt and discharge of all claims and demands of John Dunlop & Co. against them," in the event of payment of the award being made in money or bills of exchange, places the subject beyond any doubt. Dunlop & Co. had no claims and demands on Hepburn and Dundas, which were not settled in the award.

2. Could this recital impair the rights of Dunlop & Co. under the agreement of 1799.

The covenants of that agreement which were not completely satisfied were, 1st. That Hepburn and Dundas would not, after executing the deed of assignment, interfere with the measures which Colin Auld might think proper to pursue for the recovery of either the land sold to Graham, or the money due under Graham's contract; 2d. That they would convey the said lands in fee-simple, after the termination of the suit then depending, to the person who should be decided to be entitled to them.

1. The covenant not to interfere was not a present duty. The obligation it created did not come into existence until after the execution of the deed of assignment. It was to be a consequence of that deed. At the time of its execution, this was not a claim or a demand. Taking the words in their most literal sense, the covenant not to interfere would not, in the opinion of the court, be released by them; but the court is also of opinion that, if this was in any degree doubtful, these general terms would be restrained by the manifest intent of the parties, apparent on the face of the papers.

2. This release could not discharge the obligation to convey the lands, after the termination of the suit with Graham, for the reasons assigned against the foregoing objection, and for this additional reason; the deed intended to transfer to *Auld all the rights [*274] of Graham under the contract, and is so expressed; and one of the covenants in the contract assigned was, to make a conveyance with a general warranty of a title free from all encumbrances.

The recital, then, presents no solid objection to the deed of assignment, because it could not impair the rights of Dunlop & Co. Yet it is unusual and unnecessary, and had Colin Auld prepared a deed which was perfectly unexceptionable, and Hepburn and Dundas had refused to execute it, this court, although the tender might have been good at law, would probably have held them responsible for any

injury which might have been sustained in consequence of such refusal.

The power of attorney, which was tendered at the same time with the deed of assignment, appears entirely unexceptionable.

It is, then, the opinion of the court that, on the 2d of January, 1800, Hepburn and Dundas offered to do every thing which it was at that time incumbent on them to do; and that the tender made on that day, with the refusal of that tender, do in law amount to a performance, so far as to place Hepburn and Dundas in the same situation, with regard to the claims of Dunlop & Co., under the award, as if Colin Auld had accepted the deed. This, however, did not discharge them from the duty of executing a proper deed when required, nor from the duty of making conveyances for the land which was the subject of the agreement of September, 1799.

If a doubt existed on this point, the subsequent conduct of Colin Auld would, in a court of equity, amount to a waiver of the day, so far as respects the tender of the deed, and a consent to accept such deed at an after day within a reasonable time.

The subsequent demand of a deed by Colin Auld, when [*275] he tendered the money which was due on *account of the excess of value in the estimated price of the land over the sum awarded to John Dunlop & Co., was made in a manner, and under circumstances, which are not deemed reasonable. Hepburn and Dundas had a right to consider and to take counsel on the deed they were required to execute; and although their delay was unnecessarily great, yet the offer they made might have been acceded to. In fact, they might reasonably insist on leaving the transaction on the ground on which it was placed by the contract of September, 1799, which would have been done in a manner free from all exception by executing such a deed as that tendered on the 2d of January, 1800, after striking out that part of the recital which respected the release.

The interference of Hepburn and Dundas, in accommodating the suit with Graham, is also urged as an objection to their conduct. They had certainly no right to interfere without the consent of Colin Auld. But when the correspondence is inspected, and it is perceived that they interfered only to effect the object he had himself desired, and which he had avowed his own inability to effect without their consent, the interference must be considered as innocent in point of intention, and unproductive of injury in fact.

The court, then, perceive nothing in the conduct of the plaintiffs, up to the decision of the suit with Graham, which ought to defeat their right to demand a specific performance of this contract. Could

they at that time have conveyed a good title, Colin Auld ought to have accepted it.

It is alleged that the title, sold by the heirs of West to Hepburn and Dundas, was not a title to 6,000 acres of land in severalty, but an undivided interest in a much larger tract, and that, as this purchase was made, not for the purpose of acquiring an estate, but for the purpose of immediately selling and paying a debt which Auld was authorized to collect, the time of executing the contract is very material.

* It is not to be denied that circumstances may render [* 276] the time material; and the court does not decide that this case is not of that description. But the majority of the court is of opinion, that the estate is to be considered as an estate held in severalty.

That a complete partition was made by an agreement, binding on all the parties who were interested, is in full proof. This partition would unquestionably have been protected in equity, and the majority of the court conceive that after such a lapse of time, and such a long separate possession, a deed of partition ought to be presumed; and that the court, in which the verdict in the ejectment against Graham was found, might so have directed the jury.

It remains, then, only to inquire whether Hepburn and Dundas hold a title under West, which is so free from exception that the defendant ought to be decreed to take it.

Long previous to the contract with Colin Auld, Hepburn and Dundas had obtained deeds from all the devisees of John West, jun., who were entitled to undivided parts of the 6,000 acres lying on the Ohio. But the deeds from Thomas West, and Hugh West, were not recorded, and the privy examination of Mrs. Bronaugh, one of the devisees, does not appear. By her deed, therefore, nothing passed, and the deeds of Thomas and Hugh West were liable to very serious objections.

Had Colin Auld refused to receive a conveyance from Hepburn and Dundas after the termination of Graham's suit, because they were unable to make a good title, the objection would certainly have been entitled to very serious consideration. But his rejection of the conveyance then offered was not induced by any defect in the title. He previously determined not to receive a conveyance, because Graham's contract had not been assigned in such manner as he conceived to be a full execution of * the agreement of Sep- [* 277] tember, 1799. These omissions, then, to record the deeds of Thomas and Hugh West, and the total want of title as to Mrs. Bronaugh's part, have produced no real inconvenience to Colin Auld.

Had the title been unexceptionable, it would still have been refused; and this contest would still have been carried on with the same determined perseverance which marks the conduct of the parties. Under these circumstances, it is the opinion of the majority of the court, that this case ought to be governed by those general principles which regulate the conduct of a court of chancery in decreeing a specific performance, if the defect of title, which existed at the time of contract, be cured before the decree.

Are Hepburn and Dundas now able to convey a perfect title?

Mrs. Bronaugh and Mrs. Turner, two of the devisees of John West, jun., are dead. On the death of Mrs. Bronaugh, her real estate descended on her brothers and sisters, who were her co-heirs. Deeds of confirmation from Hugh and John West, and from Dade and wife have been obtained. Thomas West joined in the deed from Bronaugh and wife for the purpose of releasing his supposed reversion; but there is no conveyance from Francina Turner.

The court is not satisfied that Thomas West, by uniting in the deed for the purpose of conveying his reversionary interest, has conveyed a title which afterwards descended on him, or has estopped himself from asserting that title. To Thomas West's part of Mrs. Bronaugh's 1,000 acres, then, Hepburn and Dundas have no title.

On the death of Francina Turner, her interest in her sister Bronaugh's estate, passed to her brothers and sister, who were her co-heirs. To Thomas West's share Hepburn and Dundas have no title.

[*278] * The undivided interest of Thomas West, which descended on him, at the death of Mrs. Bronaugh, is 166⅔ acres; and the undivided interest which descended on him, at the death of Francina Turner, is 41⅓ acres; making 208 acres, to which Hepburn and Dundas have, at this time, no title.

The omission to record the deed from Thomas West is not cured; and this court is now to decide whether, under these circumstances, Hepburn and Dundas are entitled to claim a specific performance.

Had there been simply a deficiency of 208 acres, the majority of the court would have considered it as a case for compensation; or had the parties entitled to this land been before the court, a division might possibly have been directed, and compensation for that quantity ordered; but, however this might be, as persons not before the court hold this interest, no order can be made respecting it; and it may very much embarrass those acts for asserting the title which may possibly be necessary. The part actually conveyed by Thomas West, too, never having been confirmed by a deed from himself or his heirs, properly recorded, might impose on Colin Auld the neces-

sity of bringing a suit in chancery to perfect his title; or of being subjected to the inconveniences constantly attending the establishment of a deed not recorded, and the risks inseparable from such a deed.

This, therefore, is thought by a majority of the court to be a case not proper for a specific performance; and the bill is to be dismissed.

LIVINGSTON, J., expressed his non-concurrence in the reasoning of the court, in the latter part of the opinion just delivered by the chief justice. He would dismiss the bill, even if a good title could now be given by the complainants. This court can no more dispense with punctuality as to time in any case, than with any other part of the * agreement. But in this particular case, [*279] time was of the essence of the contract. The object was payment of a debt; and from the anxiety of the defendant to resist a decree for a conveyance, and the desire of the complainants to urge it upon him, it is to be presumed that the lands have fallen in value during this delay of the title. The remedy by a decree for a specific performance is a departure from common law, and ought to be granted only in cases where the party who seeks it has strictly entitled himself to it. It is said that by the English authorities, the lapse of time may be disregarded in equity, in decreeing a specific execution of a contract for land. But there is a vast difference between contracts for land in that country and in this. There the lands have a known, fixed, and stable value. Here the price is continually fluctuating and uncertain. A single day often makes a great difference; and in almost every case time is a very material circumstance.

He dissented also from another part of the opinion, which intimates that if this were simply a deficiency of a few hundred acres, it would be considered as a case of compensation. This part of the opinion does not seem to be necessary, and does not affect the present case; but this court can in no case compel a specific performance on terms and conditions. We cannot decree a special execution for part, and assess damages as to the residue.

This is like a contract for 5,000 bushels of wheat. A tender of 4,500 would not be good; and we could not compel the purchaser to take a less quantity than he contracted for. So here the contract was for 6,000 acres. The complainants have a title to a part only; we could not compel the defendant to take that part, and give him damages for the non-conveyance of the residue.

JOHNSON, J., observed, that he had perhaps taken a peculiar view of this subject, but he should be in favor of decreeing a specific

[* 280] performance generally; * leaving Auld to his remedy upon the warranty of the complainants for any defect of title which might appear. Auld, perhaps, thought it would be a good speculation, and had stipulated for a general warranty.

He acquiesced, however, in dismissing the bill, because he considered the judgment in the action at law brought by Auld against the complainants, as equivalent to a decree for a specific execution of the agreement, inasmuch as it prevents him from obtaining satisfaction in any other way for the sum awarded.

MARSHALL, C. J., declared the opinion of the court, in the action at law, to be, that the tender of the assignment of Graham's contract, and the power of attorney, was good as pleaded, and that Auld ought to have accepted it.

Judgment reversed.

1 W. 179.

THE UNITED STATES *v.* EVANS.

5 C. 280.

It is not a ground for a writ of error that the judge below refused to reinstate a cause after nonsuit.

ERROR to the district court for the Kentucky district.

In the court below, the judge at the trial rejected certain testimony which was offered by the attorney for the United States, who thereupon took a bill of exceptions, and became nonsuit, and afterwards, at the same term, moved the court to set aside the nonsuit, and grant a new trial, upon the ground that the judge had erred in rejecting the testimony. But the court overruled the motion, and refused a new trial; whereupon the attorney for the United States sued out his writ of error.

The case was submitted by the attorney-general and *Rowan*, without argument.

[* 281] * MARSHALL, C. J., delivered the opinion of the court, that in such a case, where there has been a nonsuit, and a motion to reinstate overruled, the court could not interfere.

Judgment affirmed.

YEATON and others, claimants of the Schooner General Pinkney and Cargo *v.* THE UNITED STATES.

5 C. 281.

In admiralty an appeal suspends the sentence, and it is not *res judicata* until the final sentence of the appellate court is given.

If the law, under which a sentence of forfeiture was inflicted, expire, or be absolutely repealed, after an appeal, and before sentence by the appellate court, the sentence must be reversed.

APPEAL from a sentence of condemnation by the circuit court of the United States for the district of Maryland, in the admiralty. The condemnation was for breach of the act of February 28, 1806, (2 Stats. at Large, 351,) prohibiting intercourse with certain ports in the island of St. Domingo, extended by the act of February 24, 1807, (2 Stats. at Large, 421,) but which expired April 26, 1808.

C. Lee, *Martin*, *Harper*, and *Youngs*, for appellants.

Rodney, attorney-general, for the United States.

*MARSHALL, C. J., delivered the opinion of the court to [*263] the following effect:

The majority of the court is clearly of opinion, that in admiralty cases an appeal suspends the sentence altogether; and that it is not *res adjudicata* until the final sentence of the appellate court be pronounced. The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice not only in cases of appeal from the district to the circuit courts of the United States, but in this court also.

In prize causes, the principle has never been disputed; and in the instance court, it is stated in 2 Browne's Civil Law, that in cases of appeal it is lawful to allege what has not before been alleged, and to prove what has not before been proved.

The court is, therefore, of opinion, that this cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations of the law committed while it was in force, unless some special provision be made for that purpose by statute.[1]

6 C. 203; 7 C. 112; 3 P. 57; 3 H. 534; 16 H. 369.

[1] The cases of Wilmot et al., claimants of the schooner Collector, and Lewis, claimant of the schooner Gottenburgh *v.* United States, were reversed upon the same principle.

[* 284] THE UNITED STATES *v.* POTTS and others.

5 C. 284.]

"Round copper bottoms turned up at the edge," are not liable to duties, although imported under the denomination of "raised bottoms."

THIS was a case certified from the circuit court for the district of Maryland. The question upon which the judges of that court differed in opinion was,

Whether round copper bottoms turned up at the edge are liable to the payment of duty within the meaning of the several acts of congress.

[* 285] *The following facts were admitted, namely, that the defendants imported a certain quantity of round copper plates, under the denomination "flat bottoms;" round copper plates turned up at the edges, under the denomination of "raised bottoms;" and square and oblong copper plates, under the denomination of "sheets." That the round copper plates, and the round copper plates turned up at the edge, are never used, nor imported for use in the form in which they are imported, although they are capable of being used, but not with convenience or advantage, in that form; but are worked up by the manufacturers in this country into vessels of use after importation. That the round copper plates, as well as the square copper plates, are cut from large sheets which are made by pressure under a roller, but are never imported in the size or shape in which they come from the roller. That it is a great convenience and saving to the manufacturer here, that the sheets of copper should come in a round rather than in a square shape, avoiding great waste by clipping and repeated heats. That all the said articles are sold and bought by weight, and the same price paid for the round plates, and the round plates turned up at the edges, as for the square or oblong plates. That the round copper plates turned up at the edge are raised at the edge from four to five inches. That copper plates of this description are sold for eighteen pence sterling per pound, and that copper wrought up into vessels, or implements of any kind, are sold at two shillings and fourpence to two shillings and sixpence per pound. That there is no copper imported into this country, under the denomination of plates; but that the square and oblong plates, which are commonly called copper plates, and are admitted to be free of duty, are imported under the denomination of sheets.

*MARSHALL, C. J., delivered the opinion of the court to [*286] the following effect:

The opinion of this court is, that copper plates turned up at the edge are exempt from duty, although *imported under [*287] the denomination of raised bottoms.

It appears to have been the policy of the United States to distinguish between raw and manufactured copper. From the facts stated, the copper in question cannot be deemed manufactured copper within the intention of the legislature.

The opinion certified to the court below was, that round copper bottoms turned up at the edge are not liable to the payment of duty within the meaning of the several acts of congress.

RUSH *v.* PARKER.

5 C. 287.

This court will give time to procure affidavits as to the value of the matter in dispute.

ERROR to the circuit court of the district of Maryland, in an action of replevin.

I. P. Boyd, for the defendant in error, contended, that the replevin bond being in the penal sum of $1,200 only, was conclusive evidence that the matter in dispute, exclusive of costs, did not amount to $2,000, and consequently this court has no jurisdiction in the case.

Martin, contrà, stated that he did not know till yesterday that this point would be made in the cause, and prayed time to show by affidavits the real value of the matter in dispute. Which

The court granted.

LIVINGSTON, J., thought that leave ought not to be given, on account of the delay it would produce. He had found a practice established here of receiving such affidavits; but he did not know of any case in which time had been given to produce them; and he would not consent to give it now. The case was *brought up to last term. The party ought to have come [*288] prepared to support the jurisdiction.

March 15. This being the last day of the term, and no affidavits having been produced,

The writ of error was dismissed, this court having no jurisdiction in the case.

Logan v. Patrick.

5 C. 288.

The circuit court has jurisdiction in a suit in equity, to stay proceedings upon a judgment at law between the same parties, although the subpœna be served upon the defendant, out of the district in which the court sits.

This was a case certified from the circuit court for the 7th circuit and district of Kentucky, in which the judges below differed in opinion upon the following questions:

Whether the complainant, (Logan,) who is a citizen of the State of Kentucky, and is so stated in the pleadings, can maintain this suit, in this court, against the defendant, who is a citizen and inhabitant of the State of Virginia, and is so stated in the pleadings, upon the following case: John Patrick obtained in this court a judgment in ejectment against David Logan, who filed a bill in equity against him to be relieved against the judgment, and to compel a conveyance of the land, and obtained an injunction to stay proceedings on the judgment; but the subpœna was not served in the district of Kentucky. Can this court entertain jurisdiction of the cause? If not, does the defendant's answering the bill, without insisting upon the objection that the process was not served upon him in the district of Kentucky, authorize the court to entertain the cause?

[*289] The court, upon the first opening of the case, *said there could be no doubt of the jurisdiction of the court below, and ordered it to be certified accordingly.

Radford v. Craig.

5 C. 289.

If the counsel on neither side appear when the cause is called, the writ of error will be dismissed.

No appearance having been entered on the docket for either party in this cause, no counsel appearing, the court ordered both parties to be called, and neither of them appearing, the court ordered the writ of error to be dismissed.

The same order was made in the cases of Banks v. Bastrop, Tompkins v. Tompkins, and Buchannan v. Yeates.

Harrison v. Sterry and others.

5 C. 289.

In the distribution of a bankrupt's effects in this country, the United States are entitled to a preference, although the debt was contracted by a foreigner in a foreign country; and although the United States had proved their debt under the commission of bankruptcy, and had voted for an assignee.

An assignment by one partner, in the name of the copartnership, of partnership effects and credits, for the benefit of particular creditors, is valid.

Under a separate commission of bankruptcy against one partner, only his interest in the joint effects passes.

The bankrupt law of a foreign country cannot operate a legal transfer of property in this country.

This was an appeal from a decree of the circuit court for the district of South Carolina, in a suit in equity, in which Richard Harrison was complainant, and the following parties defendants, namely: 1. The United States. 2. Sterry and others, assignees of H. M. Bird and Benjamin Savage, under a British commission of bankruptcy. 3. Aspinwall and others, assignees of Robert Bird, under an American commission of bankruptcy. 4. Several American creditors who had attached the effects of Bird, Savage & Bird, in South Carolina. 5. Several British creditors who had also attached the same effects. And, 6. Thomas Parker, who, by consent of the creditors, had been appointed by the court of common pleas in South

Carolina, an agent for all the parties concerned, to collect and receive the debts due to Bird, Savage & Bird, which had
[*290] been attached, and when *received, to hold the same till the further order of the court.

The question was, how those attached effects should be distributed.

Harrison, the complainant, claimed them as a trustee for the benefit of certain creditors of the house of Robert Bird & Co., which was the name of the firm by which the house of Bird, Savage & Bird, of London, carried on merchandise at New York. Robert Bird, desirous of aiding and supporting the credit of the house of Bird, Savage & Bird, by raising funds, upon the security of the cargo of the East India ship Semiramis, and certain debts to a large amount due to them in South Carolina, made a deed of trust on the 3d of December, 1802, intending thereby to assign that cargo and those debts to the complainant. The deed purported to be signed and sealed by H. M. Bird and Benjamin Savage, by Robert Bird, their attorney; and by Robert Bird, in his own right. It recited that, "whereas H. M. Bird, Benjamin Savage, and Robert Bird, being copartners in trade under the several firms of Bird, Savage & Bird, and Robert Bird & Co., have in consequence of disappointments been obliged to borrow money from the Bank of England, and under the firm of Robert Bird & Co. to purchase bills of exchange, public and bank stocks and goods, upon credit in America, in order to furnish means of more effectually supporting the credit of the said Bird, Savage & Bird, of London. And whereas it may be necessary for the purpose aforesaid, that the said Robert Bird & Co. should continue to make such purchases until the present difficulties may be removed; and security having been already given to the persons bound as sureties to the Bank of England, for their responsibilities, the said H. M. Bird, Benjamin Savage and Robert Bird, are desirous to secure all persons from whom purchases have been or may be made as aforesaid, for the purpose of aiding the said house or firm of Bird, Savage & Bird. Now, therefore, know ye, that
[*291] the said Henry M. Bird, Benjamin *Savage and Robert Bird, for the purpose above expressed," &c. The trust expressed was "to apply the same and every part thereof for the equal security and indemnification, in proportion to their just demands, of all persons from whom the said Robert Bird & Co. shall, before the end of the year 1803, have made any such purchases of goods, stocks, or bills, or who before that time shall be holders of any bills of exchange drawn or negotiated by the said Robert Bird & Co. for the purpose of giving support to the house of Bird, Savage & Bird, as aforesaid."

Another ground of Harrison's claim was a similar instrument of writing, dated the 31st of January, 1803, not under seal, but signed, "Bird, Savage & Bird," and "Robert Bird & Co." which signatures were in the handwriting of Robert Bird.

The bill of complaint stated that Robert Bird & Co., before and after the 3d of December, 1802, and before the end of the year 1803, made various purchases of stocks, goods, and bills of exchange, and became indebted for bills drawn and negotiated by them for the purpose of giving support to the house of Bird, Savage & Bird, which debts remain unpaid. There was a letter of attorney from Henry M. Bird and Benjamin Savage, to Robert Bird, but it did not authorize him to execute deeds in their names generally.

The claim of the United States rested upon the priority given by the act of congress of the 3d of March, 1797, sec. 5, (1 Stats. at Large, 515.)

The attaching creditors relied upon their attachments under the laws of South Carolina.

The assignees under the several commissions of bankruptcy relied upon the British and American bankrupt laws.

The United States had proved their claim under the American commission, and had voted in the * choice of as- [*292] signees. They had also attached the effects in South Carolina, under the laws of that State, and had arrested Robert Bird, and held him to bail in New York.

The court below decided that the United States were entitled to priority of payment. That after satisfaction of that claim Harrison would be entitled, under the assignment, to Robert Bird's third part or share of the property mentioned in the deed, and the attaching creditors to the other two thirds. That the assignees under the British commission could take nothing; and that the assignees under the American commission could take nothing but the surplus after all the other classes of creditors were satisfied.

From this decree all the parties, excepting the United States, appealed.

*Marshall, C. J., delivered the opinion of the court, as [*295] follows, namely:

The object of this suit is to obtain the direction of the court, for the distribution of certain funds in South Carolina, which were the property of a company trading in England, under the firm of Bird, Savage & Bird, and in America, under the firm of Robert Bird & Co. The United States claim a preference to all other creditors, and their claim will be first considered.

Two points have been suggested, as taking this case out of the operation of the preceding decisions of the court respecting the priority to which the United States are entitled.

1. That the contract was made with foreigners, in a foreign country.

2. That the United States have waived their privilege by proving their debt under the commission of bankruptcy.

1. The words of the act,[1] which entitle the United States to a preference, do not restrain that privilege to contracts made within the United States, or with American citizens. To authorize this court to impose that limitation on them, there must be some principle in the nature of the case which requires it. The court can discern no such principle. The law of the place where a contract is made is, generally speaking, the law of the contract; that is, it is the law by which the contract is expounded. But the right of priority [*299] forms no part of the contract *itself. It is extrinsic, and is rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the cause. In the familiar case of the administration of the estate of a deceased person, the assets are always distributed according to the dignity of the debt, as regulated by the law of the country where the representative of the deceased acts, and from which he derives his powers; not by the law of the country where the contract was made. In this country, and in its courts, in a contest respecting property lying in this country, the United States are not deprived of that priority which the laws give them, by the circumstance that the contract was made in a foreign country, with a person resident abroad.

2. Nor is this priority waived by proving the debt before the commissioners of the bankrupt.

The 62d section of the Bankrupt Act[2] expressly declares, that "nothing contained in that law shall, in any manner, affect the right of preference to prior satisfaction of debts due to the United States, as secured by any law heretofore passed."

There is nothing in the act which restrains the United States from proving their debt under the commission, and the 62d section controls, so far as respects the United States, the operation of those clauses in the law which direct the assignees to distribute the funds of the bankrupt equally among all those creditors who prove their debts under the commission. Omit this section, and the argument of the counsel for the general creditors would be perfectly correct. The coming in as a creditor under the commission might then be considered as electing to be classed with other creditors. But the opera-

[1] 1 Stats. at Large, 515. [2] 2 Ib. 36.

tion of this saving clause is not confined to cases in which the United States decline to prove their debt under the commission. It is universal. It introduces, then, an exception from the general rule laid down in the 29th and 30th sections of the *act,[1] and [*300] leaves to the United States that right, to full satisfaction of their debts to the exclusion of other creditors, to which they would be entitled, had they not proved their debt, under the commission.

The priority of the United States is to be maintained in this case, unless some of the creditors can show a title to the property anterior to the time when this priority attaches.

The assignment made to Richard Harrison is, it is contended, such a title.

To this assignment several objections have been made.

1. It is said that Robert Bird was not authorized to make it, because it is not a transaction within the usual course of trade. But this court is of opinion that it is such a transaction. The whole commercial business of the company in the United States was necessarily committed to Robert Bird, the only partner residing in this country. He had the command of their funds in America, and could collect or transfer the debts due to them. The assignment under consideration is an act of this character, and is within the power usually exercised by a managing partner. In such a transaction he had a right to sign the name of both firms, and his act is the act of all the partners.

2. It is the assignment of a chose in action; and is, therefore, to be considered rather as a contract than an actual transfer, and could be of no validity against the several claimants in this case.

The authorities cited at bar, especially those from 1 Atk. and William's Law Cases, are conclusive on this point to prove that equity will support an equitable assignment.

3. But a third exception has been taken to this instrument, which the court deems a substantial one. *It is made under [*301] circumstances which expose it to the charge of being a fraud on the bankrupt laws.

Considered as the act of Bird, Savage & Bird, it is dated but a few days before their bankruptcy; and considered as the act of Robert Bird & Co., it is but a short time before they stopped payment, and is made at a time when there is much reason to believe, from the face of the deed, as well as from extrinsic circumstances, that such an event was in contemplation.

Money actually advanced upon the credit of this assignment, sub-

[1] 2 Stats. at Large, 29.

sequent to its date, might perhaps be secured by it; but there is no evidence that any money was actually advanced upon it, and the face of the instrument itself would not encourage such an opinion. It might be caught at by those who were already creditors, but holds forth no inducements to become creditors. It was impossible for any person viewing it to judge of the sufficiency of the fund, or of the preëxisting liens on it.

This assignment, therefore, under all its circumstances, many of which are not here recited, is no bar to the claim of the United States, or of the attaching creditors.

This being the case, there exists no obstacle to the priority claimed by the United States, and their debt is to be first satisfied out of the fund to be distributed by the court.

2. The attaching creditors are next in order.

By the bankrupt law of the United States, their priority, as to the funds of the bankrupt, is lost. They can only claim a dividend with other creditors. So far, then, as the effects attached are the effects of the bankrupt, their lien is removed by the bankruptcy.

[* 302] Robert Bird alone has become a bankrupt under *the laws of the United States. Consequently, only his private property and his interest in the funds of the company pass to his assignees. This interest is subject to the claim of his copartners, and if, upon a settlement of accounts, Robert Bird should appear to be the creditor or the debtor of the company, his interest would be proportionably enlarged or diminished. But he is not alleged to be either a creditor or a debtor; and of consequence, the court consider his interest as being one undivided third of the fund. This third goes to his assignees.

As the bankrupt law of a foreign country is incapable of operating a legal transfer of property in the United States, the remaining two thirds of the fund are liable to the attaching creditors, according to the legal preference obtained by their attachments.

The court thinks it equitable to order that those creditors who claim under the deed of the 31st of January, 1803, and who have not proved their debts under the commission of bankruptcy, should be now admitted to the same dividend out of the estate of the bankrupt as they would have received if, instead of relying on the deed, they had proved their debts. The assignees, therefore, take this fund subject to that equitable claim, and in making the dividend, those creditors are to receive, in the first instance, so much as will place them on an equal footing with the creditors who have proved their debts under the commission.

With respect to any surplus which may remain of the two thirds,

after satisfying the United States, and the attaching creditors, it ought to be divided equally among all the creditors, so as to place them on an equal footing with each other. The dividends paid by the British assignees, and those made by the American assignees, being taken into consideration, this residuum is to be so divided between them as to produce equality between the respective creditors.

2 W. 213; 5 P. 518, 529; 4 H. 262; 6 H. 301; 17 H. 322.

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*Browne and others *v.* Strode. [*303]

5 C. 303.

The courts of the United States have jurisdiction in a case between citizens of the same State, if the plaintiffs are only nominal plaintiffs for the use of an alien.

This was a case certified from the circuit court of the United States for the district of Virginia, the judges of that court being divided in opinion upon the question, whether they had jurisdiction of the case.

It was an action on a bond given by an executor for the faithful execution of his testator's will, in conformity with the statute of Virginia. The object of the suit was to recover a debt due from the testator in his lifetime to a British subject. The defendant was a citizen of Virginia. The persons named in the declaration as plaintiffs were the justices of the peace for the county of Stafford, and were all citizens of Virginia.

The question being submitted without argument,

The Court ordered it to be certified, as their opinion, that the court below has jurisdiction in the case.

14 P. 293; 2 H. 9; 18 H. 467.

Hodgson and Thompson *v.* Bowerbank and others.

5 C. 303.

Although the plaintiff be described in the proceedings as an alien, yet the defendant must be expressly stated to be a citizen of some one of the United States. Otherwise the courts of the United States have not jurisdiction in the case.

ERROR to the circuit court for the district of Maryland. The defendants below were described in the record as "late of the district of Maryland, merchants," but were not stated to be citizens of the State of Maryland. The plaintiffs were described as "aliens, and subjects of the king of the United Kingdom of Great Britain and Ireland."

[*304] *Martin* contended, that the courts of the United States had not jurisdiction, it not being stated that the defendants were citizens of any State.

C. Lee, contrà. The Judiciary Act gives jurisdiction to the circuit courts in all suits in which an alien is a party.

MARSHALL, C. J. Turn to the article of the constitution of the United States, for the statute [1] cannot extend the jurisdiction beyond the limits of the constitution.

(The words of the constitution were found to be "between a State, or the citizens thereof, and foreign States, citizens, or subjects.")

The court said the objection was fatal.

The record was afterwards amended by consent.

2 H. 9; 16 H. 314; 18 H. 467.

KEENE *v.* THE UNITED STATES.

5 C. 304.

The district court of that district in which a seizure is made on land, has jurisdiction to try the question of forfeiture, under the 9th section of the Judiciary Act, (1 Stats. at Large, 77.)

ERROR to the circuit court for the District of Columbia. The material facts are stated in the opinion of the court.

Swann, and *Martin*, for the plaintiff.

Rodney, attorney-general, for the United States.

[1] 1 Stats. at Large, 78.

*LIVINGSTON, J., delivered the opinion of the court, as fol- [*309] lows, namely:

This is a seizure on land, by the collector of the port of Alexandria, for a breach of the act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries, and for regulating the same, passed 18th February, 1793.[1]

The breach alleged is, that a certain schooner called The Sea Flower, duly enrolled and licensed, sailed to a foreign port, without having first given up her enrolment and license, and without being duly registered. That, on her return voyage, there were imported in the said schooner, from the Havana into the port of Vienna, in the district of Maryland, certain goods, and thence transported to the town of Alexandria, in the District of Columbia, and within the collection district of Alexandria. The goods were condemned by the circuit court, and the only error relied on is, that there is no law authorizing a condemnation in a district different from that in which the forfeiture accrued.

The 35th section of the act under which the seizure was made, declares that all penalties, incurred thereby, shall be sued for in the same manner as penalties incurred by virtue of an act entitled "An act to regulate the collection of the duties imposed by law on goods, wares, and merchandises imported into the United States, and on the tonnage of ships or vessels."

On examining the different acts of congress on this subject, there is none whose title exactly corresponds with the reference here made. It is *contended by the counsel for the United [*310] States, that the act here intended, although it does not bear, in terms, the same title, is the one regulating duties, which passed the 31st of July, 1789,[2] and that this does not render it necessary that the trial should be within the district where the forfeiture accrued; while the plaintiff insists that, as this act had been repealed several years prior to the passing of the law under which this seizure was made, it is more probable that a reference was intended to another act, on the same subject, of the 4th of August, 1790,[3] which requires that the trial of any fact which may be put in issue shall be within the judicial district in which any penalty shall have accrued. It is not improbable that this was the law intended; but as the title of neither corresponds with the one given in this act, the court thinks that the proceedings on forfeitures accruing under it, may well be governed by the 9th section of the act to establish the judicial courts

[1] 1 Stats. at Large, 305. [2] Ib. 29. [3] Ib. 145.

of the United States, which confers on the district courts, jurisdiction of all seizures under laws of impost, navigation, or trade, of the United States, when the seizures are made on waters which are navigable from the sea, by vessels of ten or more tons burden, within their respective districts; and also of all seizures on land, or other waters, than as aforesaid made, and of all suits for penalties and forfeitures incurred under the laws of the United States. It is a fair construction of this section, taking the whole together, that nothing more is necessary to give jurisdiction in cases of this nature, than that the seizure should be within the district, without any regard to the place where the forfeiture accrued. It would, in many cases, be attended with much delay and injury, without any one advantage, were it necessary to send property for trial to a distant district, merely because the forfeiture had been incurred there. The court feels no disposition to impose these inconveniences on either of the parties, unless where it be positively directed by an act of congress. There being no provision of that kind in the law under which this forfeiture accrued, the court cannot perceive any error in the proceed-
[*311] ings below; and, *therefore, orders that the judgment of the circuit court be affirmed, with costs.

The United States v. Riddle.

5 C. 311.

The law punishes the attempt, not the intention, to defraud the revenue by false invoices. A doubt concerning the construction of a law may be good ground for seizure, and authorize a certificate of probable cause.

Error to the circuit court for the District of Columbia, which had affirmed the sentence of the district court, restoring certain cases of merchandise, which had been seized by the collector of Alexandria, under the 66th section of the collection law of 1799, (1 Stats. at Large, 677,) because the goods were not "invoiced according to the actual cost thereof, at the place of exportation," with design to evade part of the duties.

The goods were consigned by a merchant of Liverpool, in England, to Mr. Riddle, at Alexandria, for sale, accompanied by two invoices; one charging them at 67*l.* 5*s.* 6*d.*, the other at 132*l.* 14*s.* 9*d.*, with directions to enter them by the small invoice, and sell them by the

larger. Mr. Riddle delivered both invoices and all the letters and papers to the collector, and offered to enter the goods in such manner as he should direct. The collector informed him that he must enter them by the larger invoice, which he did. But the collector seized them as forfeited.

*Rodney, attorney-general, for the United States. [*312]

Swann, contrà.

MARSHALL, C. J., delivered the opinion of the court, to the following effect:

The court thinks this case too plain to admit of argument, or to require deliberation. It is not within even the letter of the law, and it is certainly not within its spirit. The law did not intend to punish the intention, but the attempt, to defraud the revenue.

*But as the construction of the law was liable to some [*313] question, the court will suffer the certificate of probable cause to remain as it is. A doubt as to the true construction of the law is as reasonable a cause for seizure as a doubt respecting the fact.

Sentence affirmed.

HIMELY *v.* ROSE.

5 C. 313.

It is not necessary to take exceptions to the report of auditors, if the errors appear upon the face of the report.

If the property, ordered to be restored, be sold, interest is not to be paid, unless specially ordered by the decree.

THIS was an appeal from so much of the final sentence of the circuit court for the district of South Carolina, rendered upon the mandate from this court issued upon the reversal of the former sentence of that court, (4 C. 292,) as affirmed the report of auditors appointed by the court.

* *Martin* and *Jones*, for Himely, the appellant. [*314]

C. Lee, contrà. [*315]

[*316] *MARSHALL, C. J., delivered the opinion of the court, as follows:

A decree having been formerly rendered in this cause, the court is now to determine whether that decree has been executed according to its true intent and meaning.

That decree directed "the cargo of The Sarah to be restored to the original owners, subject to those charges of freight, insurance, and other expenses, which would have been incurred by them in bringing the cargo into the United States."

In carrying this decree into execution, an allowance has been made for freight, and for expenses incurred at the port of importation; but no allowance has been made for expenses at the port of lading, nor for insurance. The appellants, too, were charged with interest on the money into which the cargo had been converted.

No exception having been taken to this report, it is now liable to those exceptions only which appear on its face.

So far as respects freight, and the expenses at the port of entry and delivery, the report must be considered as correct; but in those items of the claim which were disallowed, the error, if it be one, is apparent on the face of the proceedings, and may therefore be corrected.

The court has not considered the appellants as infected by the marine trespass committed by the captors of The Sarah and her cargo. Their operations commence with their purchase at St. Jago de Cuba; and the decree designed, and is thought to have been so expressed, as to charge the owners with all the expenses which they would have incurred, had they made the purchase themselves. Had [*317] they *done so, they must have incurred some expenses at the port of lading. Among these is certainly not to be estimated the price of the cargo; but any expense necessarily attendant upon the transaction, such as putting the cargo on board, may properly, under this decree, be charged to the owners.

It is obvious, too, that the owners, or the underwriters, if they represent the owners, had they been the purchasers, must have insured the vessel and cargo from St. Jago de Cuba to the United States, or must themselves have stood insurers; in which latter case the risk is deemed equal to the insurance. The decree, therefore, formerly rendered by this court, is understood to have entitled the appellants to insurance.

The question of interest is more doubtful; but this court is of opinion that the appellants ought not to be charged with interest.

Restitution of the cargo was awarded. The property having been sold, the money proceeding from the sales is substituted for the specific articles. If this money remains in possession of the court, it

carries no interest; if it be in the hands of an individual, it may bear interest, or otherwise, as the court shall direct. But it is not supposed that the party, to whom restitution is awarded, receives interest in such case, unless it be decreed by the court. This court did not decree interest; nor would interest have been decreed, in this case, had the particular fact of the sale been brought before them.

The circumstances of the case were such as to restrain the court from inserting in its decree any thing which might increase its severity. The loss was heavy; and it fell unavoidably on one of two innocent parties. The court was not inclined to add to its weight, by giving interest in the nature of damages. The allowance of interest, therefore, in the court below, is overruled.

The sentence of the circuit court is reversed.

*Johnson, J. When the mandate of this court was received in the court below, auditors were nominated, by consent, to report what would be the usual mercantile allowance between the parties; and to state an account accordingly. Those auditors reported against the allowance of insurance, and in favor of interest. The supposition that the expense of transportation was not allowed, I am convinced, must be incorrect; for insurance and interest were the subject of the only two exceptions taken to their report. Upon hearing argument on these two exceptions, the court affirmed their report upon both these points, and I have since heard no reason to alter the opinion which I entertained on the argument below. [*318]

It is contended that the mandate of this court was peremptory as to the allowance of insurance, and did not sanction the charge of interest. The words of the mandate, so far as relates to these points, are the following: "subject to those charges for freight, insurance, and other expenses, which would have been incurred by the owners in bringing the cargo into the United States; which equitable deductions the defendants are at liberty to show to the circuit court," &c. These words imperatively require two things; namely, that the deductions, to be allowed to Himely, should be equitable in their nature, and should be shown to the court. Upon what ground could an allowance for insurance have been deemed just or equitable? It could only have been upon Himely's having actually paid an insurance, which he was at liberty to show, or upon his having himself incurred that risk, which would have been covered by insurance. The fact was admitted, that he had not insured, and as to having incurred any risk himself, I cannot understand in what possible view he could have incurred a risk, when this court has decided that if the property

had been lost, he would have lost nothing. It was not the property of Himely, it was the property of Rose; had it been sunk in the ocean, it would not have been the loss of Himely, it would [*319] have * been the loss of Rose; there can be no reason, then, why Rose, who ran all the risk, should be adjudged to pay an insurance to Himely, who incurred no risk; but such is the effect of deducting it from the sum to be paid to Rose. After deciding that the property was not changed, that it still continued in Rose, and was never vested in Himely, I feel confused by the inquiry on what possible ground the allowance for insurance can be sanctioned.

With regard to interest, the question is not so clear, but the difficulty does not arise upon the abstract equity of the charge. In equity, interest goes with the principal, as the fruit with the tree. Rose is now to be considered as the rightful owner of the property, and ought to have had the possession and use of it, during the existence of this contest. But Himely, having given stipulation bonds, was, by the order of the district court, admitted to the possession and use of it, added it to his capital, traded upon it, and made such profits and advantages of it as his skill or ingenuity suggested. Rose, in the meantime, was kept out of the use of it, and lost those emoluments and mercantile advantages which might have resulted from the use of it. It was not a case in which the property is locked up in a warehouse, or the proceeds thereof deposited in the hands of the register of this court, but a case in which the goods were, in fact, converted into money by the effect of the stipulation bond, and the use of it given to Himely, to the prejudice of Rose; there could, therefore, be no radical objection to the charge, on the ground of equity. Had the mandate issued to restore to the party a flock of sheep, or stock, or bonds bearing interest, it is presumed that it would have been construed to authorize the delivery of their natural or artificial increase without any express words to carry them. But it is said that the mandate does not expressly authorize this allowance. This is true; but it must be recollected that the mandate of this court enjoins the allowance of equitable deductions. Now a variety of [*320] *deductions may be, in the abstract, equitable, but may lose that character by its being made to appear that ample compensation has been already made for them. It was in this light that the court below sustained the charge of interest; because having had the usufruct of the property concerning which those charges on his part, which merited the denomination of equitable deductions, were incurred, it appeared to the court in fact that he had been compensated in part for those advances by the use of the money. If this court had not made use of the terms equitable deductions, that court

probably would not have thought itself sanctioned in doing what appeared so equitable between the parties.

10 W. 431; 9 P. 275; 12 P. 488; 3 H. 413; 15 H. 451.

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* WELSH *v.* MANDEVILLE and JAMESSON. [*321]

5 C. 321.

This court will not compel a hearing, unless the citation be served thirty days before the first day of the term.

Youngs, for the defendant in error, objected to the hearing of the cause at this term, the citation not having been served thirty days before the first day of the term.

E. J. Lee, contrà.

THE COURT refused to take up the case without consent, although thirty days had then elapsed since the service of the citation; and observed, that the case of Lloyd *v.* Alexander only decided that the court will not take up the case until thirty days have expired since the service of the citation; but it did not decide that the court would then take it up without consent.

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* RIDDLE & Co. *v.* MANDEVILLE and JAMESSON. [*322]

5 C. 322.

Under the law of Virginia, the holder of a negotiable promissory note may maintain a bill in equity against a remote indorsor, to recover its contents.

The right thus asserted, is the right of the indorsee who took the note from the defendant, and therefore any legal defence, valid as against such immediate indorsee of the defendant, is valid in equity as against the remote indorsee.

APPEAL from the circuit court for the District of Columbia, in a suit in chancery. The questions raised, and the material facts, appear in the opinion of the court.

E. J. Lee and *Simms*, for the appellants.

Youngs, *Swann*, and *C. Lee*, for the appellees.

[*328] *MARSHALL, C. J., delivered the opinion of the court, as follows:

This suit is brought by the holder of a promissory note, to recover its amount from a remote indorsor. In a suit between the same parties, this court had previously determined that the plaintiff was without remedy at law. It is now to be decided whether he is entitled to the aid of a court of equity.

[*329] If, as was stated by the counsel for the defendants, the question is, whether a court of chancery *would create contracts into which individuals had never entered, and decree the payment of money from persons who had never undertaken to pay it, the time of this court has been very much misapplied indeed in attending to the laborious discussion of this cause. The court would, at once, have disclaimed such a power, and have terminated so extraordinary a controversy.

But the real questions in the case are understood to be, whether the plaintiffs, as indorsees of a promissory note, have a right, under the laws of Virginia, to receive its amount from the indorsor on the insolvency of the maker; whether the defendants, as the original indorsors of the note, are ultimately responsible for it; and whether equity will decree the payment to be immediately made, by the person ultimately responsible, to the person who is actually entitled to receive the money.

This note came to the hands of M'Clenachan, indorsed in blank by Mandeville and Jamesson. M'Clenachan had a right to fill up the indorsement to himself, and he has done so. The law, as understood in Virginia, immediately implied an *assumpsit* from Mandeville and Jamesson to M'Clenachan to pay him the amount of the note, if he should use due dilligence, and should be unable to obtain payment from the maker. M'Clenachan indorsed this note to the plaintiffs, and, by so doing, became liable to them in like manner as Mandeville and Jamesson were liable to him.

The maker having proved insolvent, the plaintiffs have a legal right to claim payment from M'Clenachan, and, on making that payment, M'Clenachan would be reinvested with all his original rights in the note, and would be entitled to demand payment from Mandeville and Jamesson.

[*330] If there were twenty successive indorsors of a note, this circuitous course might be pursued, and, *by the time the ultimate indorsor was reached, the value of the note would be expended in the pursuit. This circumstance alone would afford a

strong reason for enabling the holder to bring all the indorsors into that court which could, in a single decree, put an end to litigation. No principle adverse to such a proceeding is perceived. Its analogy to the familiar case of a suit in chancery by a creditor against the legatees of his debtor is not very remote. If an executor shall have distributed the estate of his testator, the creditor has an action at law against him, and he has his remedy against the legatees. The creditor has no action at law against the legatees. Yet it has never been understood that the creditor is compelled to resort to his legal remedy. He may bring the executor and legatees both before a court of chancery, which court will decree immediate payment from those who are ultimately bound. If the executor and his securities should be insolvent, so that a suit at law must be unproductive, the creditor would have no other remedy than in equity, and his right to the aid of that court could not be questioned.

If doubts of his right to sue in chancery could be entertained while the executor was solvent, none can exist after he had become insolvent. Yet the creditor would have no legal claim on the legatees, and could maintain no action at law against them. The right of the executor, however, may, in a court of equity, be asserted by the creditor, and, as the legatees would be ultimately responsible for his debt, equity will make them immediately responsible.

In the present case, as in that which has been stated, the insolvency of M'Clenachan furnishes strong additional motives for coming into a court of chancery. Mandeville and Jamesson are ultimately bound for this money, but the remedy at law is defeated by the bankruptcy of an intermediate indorsor. It is only a court of equity which can afford a remedy.

* This subject may and ought to be contemplated in still [* 331] another point of view. It has been repeatedly observed, that the action against the indorsor is not given by statute. The contract on which the suit is maintained is not expressed, but is implied from the indorsement itself, unexplained and unaccompanied by any additional testimony. Such a contract must, of necessity, conform to the general understanding of the transaction. General opinion certainly attaches credit to a note, the maker of which is doubtful, in proportion to the credit of the indorsors, and two or more good indorsors are deemed superior to one. But if the last indorsor alone can be made responsible to the holder, then the preceding names are of no importance, and would add nothing to the credit of the note. But this general opinion is founded on the general understanding of the nature of the contract. The indorsor is understood to pass to the indorsee every right founded on the note which he himself possesses. Among

these is his right against the prior indorsor. This right is founded on an implied contract which is not by law assignable. Yet if it is capable of being transferred in equity, it vests, as an equitable interest, in the holder of the note. No reason is perceived why such an interest should not, as well as an interest in any other chose in action, be transferable in equity. And if it be so transferable, equity will of course afford a remedy. The defendant sustains no injury, for he may defend himself in equity against the holder as effectually as he could defend himself against his immediate assignee in a suit at law.

The case put, of the sale and delivery of a personal thing, is not thought to be analogous to this. The purchaser of a personal thing does not, at the time of the contract, look beyond the vendor. He does not trace the title. It passes by delivery. But suppose the vendor held it by a bill of sale containing a warranty of title, and should assign that bill to his vendee; is it clear that, on loss [*332] of the property for defect of title, no recourse could * be had to the warrantor of that title? The court is not prepared to answer this question in the affirmative.

It is contended that the indorsee of the note holds it subject to every equity to which it was liable in the hands of the indorsor.

If this be admitted, it is not perceived that the admission would, in any manner, affect this case.

It is also contended that the plaintiff can only recover what he actually paid.

Without indicating any opinion on this point, the court considers it as very clear that the indorsement is *primâ facie* evidence of having indorsed for full value, and it is incumbent on the defendant to show the real consideration, if it was an inadequate one.

Usury has been stated in the argument, but it is neither alleged in the pleadings, nor proved by the testimony.

It is urged that Mandeville and Jamesson are securities who have received no actual value, and that equity will not charge a security who is discharged at law. In support of this argument the case of a joint obligation is cited.

It is true, that, in the case of a joint obligation, the court has refused to set up the bond against the representatives of a security. But, in that case, the law had absolutely discharged them. In this case, Mandeville and Jamesson are not discharged. They are not released from the implied contract created by the indorsement. It is the legal remedy which is obstructed; the right is unimpaired, and the original obligation is in full force.

It is, then, the opinion of this court that, without referring to the depositions to which exceptions have been taken, a right exists

in the holder of a *promissory note, at least where he [*333] cannot obtain payment at law, to sue a remote indorsor in equity.

Certainly, in such a case, the defendant has a right to insist on the other indorsors being made parties, but he has not done so; and, in this case, the court does not perceive that M'Clenachan is a party so material in the cause, that a decree may not properly be made without him.

The decree is reversed, and the defendants directed to pay the amount of the note to the plaintiffs.

2 P. 331.

Dulany v. Hodgkin.

5 C. 333.

Under the law of Virginia, an indorsee of a negotiable promissory note cannot maintain an action at law against his immediate indorsor, without proof of insolvency of the maker, or of a suit against him, even if the maker resided out of the jurisdiction, and the indorsor put his name on the note to give it credit with the plaintiff, and took security for his indemnity.

Error to the circuit court for the District of Columbia. This court, without argument, and no opinion being given, affirmed the judgment of the court below, where the question stated in the marginal note was raised and decided, as therein appears.

3 H. 515.

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*Yeaton v. Fry. [*335]

5 C. 335.

An exception of certain risks in a policy of insurance is not a warranty.

Insurance against "all risks, blockaded ports and Hispaniola excepted," covers the risks of a voyage to a port in fact blockaded, but not known to be so till the vessel was warned off.

Such an exception covers only the particular dangers of blockade, which induced the exception.

Sailing for a port knowing it to be blockaded, would have incurred a blockade risk, and been within the exception.

Copies of the proceedings of a foreign court of admiralty, may be authenticated by the seal of the court and the attestation of the deputy registrar, and the certificate of the judge under his hand and the seal of the court, attesting the seal, and the fact that the person signing is registrar; and the certificate and seal of the secretary and notary of the island, proving that the person signing as judge, holds that office.

Such proof is in conformity with the law, and also with the 19th article of the treaty of 1794 with Great Britain. (8 Stats. at Large, 116.)

The plaintiff may read depositions taken by the defendant.

ERROR to the circuit court for the District of Columbia, in an action of *assumpsit* on a policy of insurance. The principal question, as to the construction of the policy, and the material facts on which it turned, appear in the opinion of the court.

One of the errors assigned was, that the circuit court admitted in evidence copies of proceedings in the vice-admiralty court at Jamaica. The deputy registrar of that court affixed the seal of the court to the copy, and certified to its correctness. The judge of the court also affixed the seal of the court, and certified that the person whose signature was affixed, was deputy registrar; and the secretary and notary public of the island, under his hand and official seal, certified that the person who signed as judge of the court, exercised and held that office. And the error assigned was, that the court below suffered the plaintiff to read in evidence depositions taken by the defendants under a commission, notice having been given to the plaintiff's attorney and by him given to the plaintiff. Judgment was rendered for the plaintiff, and the defendant brought error.

Youngs and *Jones*, for the plaintiff.

E. J. Lee and *C. Lee*, for the defendant.

[*341] * MARSHALL, C. J., delivered the opinion of the court, as follows, namely:

The material question in this case grows out of an exception in a policy of insurance.

The plaintiff insured a specified sum on the brig Richard, belonging to the defendant, "at and from Tobago to one or more ports in the West Indies, and at and from thence to Norfolk;" and the insurance is declared to be made against "all risks, blockaded ports and Hispaniola excepted."

The Richard sailed from Tobago for Curraçoa, which was then blockaded in fact, but the blockade was not known at Tobago when the vessel sailed, nor was it known to the captain until he was warned off by a British ship of war. He then sailed for Norfolk; but on his voyage was captured by a French privateer, by whom the vessel was

plundered to a considerable extent, and ordered to St. Domingo for trial.

The question is, whether this risk comes within the exception contained in the policy.

The counsel has considered the exception as a warranty; but the court cannot so consider it. The words are the words of the insurer, not of the insured; and they take a particular risk out of the policy which, but for the exception, would be comprehended in the contract.

* What is that risk? [*342]

Policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed, in order to effect the real intention of the parties, if that intention can be clearly ascertained.

In that part of the policy on which the present controversy depends, a few words are given, to which others must be subjoined in order to complete the sense, and give a full description of the risk against which the underwriters were unwilling to insure. These words are, "blockaded ports and Hispaniola excepted."

It is reasonable to suppose that a voyage to Hispaniola was not insured. The assured has notice of this, and if he sails for Hispaniola, the voyage is entirely at his own risk. Against the risks of such a voyage, whatever they may be, the underwriters will not insure. It is a specified place, excluded, by consent, from the policy. The perils attending the voyage are understood, whether they arise from the sea, or otherwise, and are all excepted. The motives for making the exception do not appear, nor can they be inferred from the instrument.

The plaintiff in error contends that the same reasoning applies, in its full extent, to the exception of blockaded ports; but the court does not think so.

Hispaniola is excepted absolutely from the policy; but other ports are within the terms of the voyage insured, if they be not blockaded. It is their character, as blockaded ports, which excludes them from the insurance. Their being excepted by this character, is thought to justify the opinion, that it is the risk attending this character which produces the exception, and which is the risk excepted. The risk of a blockaded port, as a blockaded port, is the risk incurred by breaking the blockade. This is defined * by public law. [*343] Sailing from Tobago for Curraçoa, knowing Curraçoa to be blockaded, would have incurred this risk, but sailing for that port, without such knowledge, did not incur it.

The underwriter had no objection to a voyage to Curraçoa, other

than might arise from its being blockaded. The dangers of the blockade, therefore, were the particular dangers which induced the exception, and it seems to the court that the exception ought not to be extended beyond them. If this be correct, the circuit court committed no error in refusing to give the opinion which was required by the counsel on this point.

The sentence in this case is sufficiently authenticated to be received as evidence. Being a court acting under the law of nations, its proceedings may be proved according to the mode observed in the present case; and were this doubtful, that doubt would be removed by the circumstance that it is the form stipulated by treaty.

The defendant is not at liberty to except to his own depositions, because he does not produce proof of his having given notice to the plaintiff. The admission of notice by the plaintiff is certainly sufficient, if notice to him was necessary, to enable him to use the defendant's deposition.

The fourth bill of exceptions depends on the principles stated by the court, in the first part of this opinion.

There is no error in the judgment of the circuit court, and it is affirmed, with costs.

[*344] *OWINGS v. NORWOOD'S LESSEE.

5 C. 344.

If a defendant in ejectment sets up an outstanding title in a third person, under whom he does not claim, and the validity of this title depends upon the effect of a treaty, this is not "a case arising under a treaty," of which this court has jurisdiction, under the 25th section of the Judiciary Act, 1 Stats. at Large, 85.

The "interest in lands by debts," intended to be protected by the 5th article of the treaty of peace (8 Stats. at Large, 80,) with Great Britain, must be an interest held as security for money at the time of the treaty.

ERROR to the court of appeals of the State of Maryland, in an action of ejectment. At the trial the defendant set up an outstanding title in one Scarth, a British subject, and proved that in 1706 the land was mortgaged to Scarth to secure the payment of £800 in May, 1709. It appeared that Scarth and his heirs were charged with the lord proprietor's quit-rents down to the time of the Revolution. The court of appeals had decided, that at the expiration of the term of credit, a fee simple estate became vested in the mortgagee, liable to

confiscation and effectually confiscated by the act of the State of Maryland; and as the plaintiff in ejectment claimed under the State, that this mortgage title was not outstanding.

Harper, and *Martin*, for the plaintiff.

Ridgely, and *Johnson*, attorney-general of Maryland, for the defendant.

*MARSHALL, C. J. There are only two points in this case. [*347]

1. Whether Scarth had such an interest as was protected by the treaty; and,

2. Whether the present case be a case arising under a treaty, within the meaning of the constitution.

This court has no doubt upon either point.

The interest by debt intended to be protected by the treaty, must be an interest holden as a security for money at the time of the treaty; and the debt must still remain due.

The 25th section of the Judiciary Act must be restrained by the constitution, the words of which are, "all cases arising under treaties." The plaintiff in error does not contend that his right grows out of *the treaty. Whether it is an obstacle to the plain- [*348] tiff's recovery, is a question exclusively for the decision of the courts of Maryland.

Harper, on the next day, having suggested to the court that he understood the opinion to be, that this court had no jurisdiction to revise the decisions of the state courts, in cases where the construction of a treaty was drawn in question incidentally, and where the party himself did not claim title under a treaty, was about to make some further observations on those points, when,

MARSHALL, C. J., observed, that *Mr. Harper* had misunderstood the opinion of the court, in that respect. It was not that this court had not jurisdiction if the treaty were drawn in question incidentally.

The reason for inserting that clause in the constitution was, that all persons who have real claims under a treaty should have their causes decided by the national tribunals. It was to avoid the apprehension as well as the danger of state prejudices. The words of the constitution are, "cases arising under treaties." Each treaty stipulates something respecting the citizens of the two nations, and gives them rights. Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial de-

cisions of the States; and whoever may have this right, it is to be protected. But if the person's title is not affected by the treaty, if he claims nothing under a treaty, his title cannot be protected by the treaty. If Scarth or his heirs had claimed, it would have been a case arising under a treaty. But neither the title of Scarth, nor of any person claiming under him, can be affected by the decision of this cause.

Writ of error was dismissed.

5 P. 248; 10 P. 368; 10 H. 311; 11 H. 529.

[*351] *Moss v. Riddle & Co.

5 C. 351.

A bond cannot be delivered to one of the obligees as an escrow.
Fraud consists in intention; and that intention is a fact which must be averred in a plea of fraud.

Error to the circuit court for the District of Columbia, in an action of debt upon the joint bond of Welsh and Moss for the payment of money.

Welsh, who was the principal debtor, not being found in, and not being an inhabitant of, the District of Columbia, the suit abated as to him.

The defendant Moss, in his first plea, after protesting
[*352] *that he did not deliver to any person, unconditionally, as his act and deed, the writing in the declaration mentioned,
[*353] averred that he signed and *sealed the same, and delivered it to Joseph Riddle, one of the plaintiffs, as an escrow, to be his act and deed, on condition that the same should af-
[*354] terwards *be signed, sealed, and delivered by some other friend of Welsh, which was not done, and so the said writing is void as to him the said Moss.

To this plea the plaintiffs demurred specially; 1st. Because a bond cannot be delivered to the obligee himself as an escrow; 2d. Because the plea does not state by what other friend of Welsh it was to have been executed; 3d. Because it did not state by whom the execution of the bond, by that other friend, was to have been procured, leaving it uncertain whether the condition upon which it was to become the deed of Moss was to be performed by him, or by Riddle, or by

Welsh; 4. Because the plea is repugnant, inconsistent, and informal. The second plea, after protesting as in the first plea, avers, that Riddle came to the defendant and asked him whether Welsh had not applied to him, Moss, to be his security for a debt due to Riddle & Co.; to which Moss replied he had told Welsh he would not be security alone, but would join Welsh and some other friend of his as security for the debt, whereupon Riddle represented that the greatest confidence was placed in Welsh; that * the partner- [*355] ship of Riddle & Co. was about to be dissolved; that Riddle would take care to keep the paper, if it was executed, in his dividend of the debts; that Welsh and Moss might sign the bond at that time, and some other person might sign it afterwards; that in regard to the debt he would look only to Welsh, and would also give Welsh a credit for goods, when he, Riddle, should open and commence business on his private and individual account. The plea further avers, that Moss being induced by that representation and promise, did sign, seal, and deliver the writing, upon condition that some other friend of the said Welsh should also sign, seal, and deliver the same, and not otherwise; which was never done. That Riddle did afterwards carry on trade and merchandise, on his own separate and individual account, but never afterwards credited Welsh with any goods or merchandise; "and so the said writing, made and executed as aforesaid, is void as to him, the said Robert Moss."

To this plea the plaintiff also demurred specially, for the causes stated in the first demurrer; and further, because the plea is multifarious, argumentative, and offers to put in issue a number of matters unconnected with the defence set up, and immaterial in themselves.

The court below gave judgment for the plaintiffs upon both demurrers.

* *C. Lee* and *Swann*, for the plaintiff in error. [*356]

E. J. Lee and *Jones*, contrà.

* MARSHALL, C. J., delivered the opinion of the court, to [*357] the following effect:

It is admitted by the counsel in this case, that a bond cannot be delivered to the obligee as an escrow. But it is contended that where there are several obligees constituting a copartnership, it may be delivered as an escrow to one of the firm. The court, however, is of opinion that a delivery to one is a delivery to all. It can never be necessary to the validity of a bond that all the obligees should be convened together at the delivery.

Upon the other point the counsel for the plaintiff in error has insisted that the plea is sufficient.

But the court thinks it so radically defective as to be bad even upon general demurrer.

There is no allegation of fraud, and the circumstances pleaded do not, in themselves, amount to fraud.

Fraud consists in intention, and that intention is a fact which ought to have been averred, for it is the gist of the plea, and would have been traversable.

Upon what was the plaintiff below to take issue? Upon all the circumstances stated in the plea, which are mere inducement, or upon the conclusion that "the bond is void?" If he had traversed [*358] the inducement, the issue would have been immaterial; *if he had traversed the conclusion, it would have been putting in issue to the jury matter of law.

Judgment affirmed, with costs.

C. Lee suggested that there was also an exception to the refusal of the court to allow an amended plea to be filed, after the court had adjudged the pleas bad.

But the chief justice said that the court had, in an early part of this term,[1] decided that such refusal was no error for which the judgment could be reversed.

BRENT *v.* CHAPMAN.

5 C. 358.

Five years' adverse possession of a slave in Virginia, gives a good title, upon which trespass may be maintained.

ERROR to the circuit court for the District of Columbia, sitting at Alexandria, in an action of trespass brought by Chapman against Brent, marshal of the District of Columbia, for taking in execution, on a *fi. fa.*, against the estate of Robert Alexander, deceased, a slave named Ben, who was claimed by Chapman as his property.

The jury found a verdict for the plaintiff, subject to the opinion of the court upon a statement of facts agreed by the parties, which was in substance as follows:

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[1] See the case of Mandeville and Jamesson *v.* Wilson, at this term.

The slave was the property, and in possession of the late Robert Alexander, the elder, at the time of his death. His sons, Robert Alexander, and Walter S. Alexander, were named executors of his will, but never qualified as such. On the 17th of December, 1803, Walter S. Alexander took out letters of administration with the will annexed. No division was * ever made, by the [*359] order of any court, of the personal estate of the deceased among his representatives; but previous to August, 1800, a parol division of the slaves was made between Robert Alexander the younger, and his brother, Walter S. Alexander, the latter being then under the age of twenty-one years. Robert Alexander the younger being possessed of the slave, and being taken upon an execution for a debt or debts due from himself in his individual character, in August, 1800, took the oath of insolvency under the laws of Virginia, and delivered up to the sheriff of Fairfax county, in that State, the slave, as a part of his property included in his schedule. The sheriff sold him at public sale, and the plaintiff, knowing the slave to belong to the estate of the deceased Robert Alexander, as aforesaid, became the purchaser for a valuable consideration, and took possession of the slave, and continued possessed of him under the sale and purchase until July, 1806. The plaintiff in the winter usually resided in Maryland, and in the summer in Virginia, on his farm, where he kept the slave, and has never resided in the District of Columbia.

Dunlop & Co. obtained judgment against Robert Alexander the younger, as executor of his father Robert Alexander, and, upon a *fieri facias* issued upon that judgment, the marshal seized and took the slave as part of the estate of the testator Robert Alexander, there being no other property belonging to his estate in the county which could have been levied except what Robert Alexander the younger had sold and disposed of, for the purpose of paying his own debts. The agent of the creditors, Dunlop & Co., as well as the marshal, had notice, prior to the sale, that the plaintiff claimed the slave.

Upon this state of the case, the court below rendered judgment for the plaintiff, according to the verdict. And the defendant brought his writ of error.

* *C. Lee*, for the plaintiff. [*360]

Swann, contrà.

* Marshall, C. J., delivered the opinion of the court, to [*361] the following effect:

This court is of opinion, that the possession of Chapman was a

bar to the seizure of the slave by the marshal, under the execution stated in this case. The only objection of any weight was, that there was no administration upon the estate of Robert Alexander, sen., and, consequently, that the possession of Chapman was not an adverse possession.

But there was an executor competent to assent, and who did assent, to the legacy, and to the partition between the legatees, and who could not afterwards refuse to execute the will.

Judgment affirmed.

11 W. 361; 16 P. 291; 9 H. 407.

AULD *v.* NORWOOD.

5 C. 361.

If the owner of a slave permit her to remain in the possession of A. for four years, and A. then, without the assent of the owner, delivers her to B., who keeps her four years more, the possession of B. cannot be so connected with the possession of A. as to make it a fraudulent loan within the act of assembly of Virginia, in regard to B.'s creditors.

ERROR to the circuit court for the District of Columbia, sitting at Alexandria, in an action of detinue for a female slave named
[*362] Eliza. Upon the *trial of the general issue in the court below, the plaintiff in error, who was defendant in that court, took a bill of exceptions, which stated that evidence was offered of the following facts: The slave, in November, 1798, was the property of John Dabny, against whom a *fieri facias* was issued at the suit of Norwood, the present defendant in error, upon which the slave was seized and sold by the proper officer; that one Charles Turner bought her for the said Norwood, and held her, as Norwood's property, until November, 1802, when he delivered her, without authority from Norwood, to one R. B. Jamesson, who held her until September, 1806, when he became insolvent under the insolvent act of the District of Columbia, and delivered her, as part of his property, to Auld, the plaintiff in error, who was appointed trustee under that act. This suit was commenced on the 19th of September, 1806.

Whereupon the plaintiff in error prayed the court to instruct the jury, that if they found the facts to be as stated, the plaintiff below was not entitled to recover. And if the court should not think proper to give that instruction, that they would instruct the jury that

the plaintiff's suffering the slave to remain out of his actual possession for so long a time was fraudulent in law as to the defendant. Which instructions the court refused to give, and the defendant Auld excepted. The verdict and judgment being against him, he brought his writ of error.

Swann, for the plaintiff in error.

*C. Lee, and *E. J. Lee*, contrà, contended, [*363]

That the possession of Jamesson, which was adverse to Norwood, could not be connected with Turner's possession, which was under Norwood, so as to make the case a fraudulent loan within the statute.

And of that opinion was the court.

Judgment affirmed.

Slacum v. Simms and Wise.

5 C. 363.

A magistrate who has received a deed of trust from an insolvent debtor, which deed is fraudulent in law as to creditors, is incompetent to sit as a magistrate in the discharge of the debtor under the insolvent law of Virginia. And the discharge so obtained is not a discharge in due course of law.

Error to the circuit court for the District of Columbia, sitting at Alexandria.

The former judgment of the court below having been reversed in this court at February term, 1806, (3 C. 300,) and remanded for further proceedings, the following statement of facts, in the nature of a special verdict, was agreed upon by the parties.

That the defendants executed the bond in the declaration mentioned. That the defendant Simms, being in custody under the execution mentioned in *the condition of the bond, [*364] afterwards obtained his discharge as an insolvent debtor, by authority of the act of assembly of Virginia, entitled "An act for reducing into one the several acts concerning executions, and for the relief of insolvent debtors." That he was discharged from the prison bounds by warrant from Amos Alexander and Peter Wise, jr., two of the aldermen or justices of the corporation of Alexandria, before whom Simms delivered in a schedule of his estate, and took the oath

of an insolvent debtor in the manner prescribed by the act, and being so discharged, he departed out of prison bounds, and not before, or in any other manner. That the defendant, Peter Wise, jr., is the same Peter Wise who acted as one of the justices, and who signed the warrant of discharge, and that Simms, before taking the oath, executed a deed, conveying all his property, real and personal, to John Wise, and the said Peter Wise, in trust, for the benefit of the creditors of Simms, who, notwithstanding the said deed, afterwards, and after his discharge, exercised acts of ownership over the property. That Peter Wise never acted under the deed of trust. That the deed of trust was made by Simms with a view of preventing the effect of the plaintiff's execution, and was fraudulent in law, but such fraud was without the participation of the said Peter Wise; and without his privity, other than that the said deed was exhibited to the said magistrates, and discussed by counsel before them, at the time the schedule was delivered, and the oath administered.

That no escape warrant was ever applied for in consequence of Simms's departing from the prison bounds.

That if the law be for the plaintiff as to both defendants, or either of them, judgment to be entered for $2,570.90, to be discharged by the payment of $1,820.20, damages and costs against such defendant or defendants severally; but if the law be for either or both
[*365] of the defendants, *then judgment to be entered for such defendant or defendants severally.

The schedule referred to in the statement, was as follows: "I have neither real or personal property, but what has been conveyed by a deed of trust to John Wise and Peter Wise, jr., for the use of my creditors, as will appear, reference being had to said deed.

(Signed) "JESSE SIMMS.

"*August* 30*th*, 1800."

The court below decided the law for both defendants; and the plaintiff sued out his writ of error.

Swann, for the plaintiff in error.

[*366] *C. *Lee*, and *Jones*, contrà.

[*367] *MARSHALL, C. J., delivered the opinion of the court, to the following effect:

The former case between these parties presented the single circumstance of fraud in Simms, the principal debtor, in which Wise had no share, as it was then stated.

The decision in that case does not affect the present. It is here stated that the defendant Wise was one of the magistrates who granted the discharge, and who received a conveyance from Simms of all his estate, &c.

It cannot be doubted, that if there had been a combination between the surety of the insolvent and the magistrate to grant the discharge, such surety could never plead that discharge in bar of this action. Such would have been the law if Peter Wise the surety had been a different person from Peter Wise the magistrate. But being the same person, he is clearly incompetent. He is directly interested, and his interest appears upon the record.

But the case is stronger when we consider the irregularity of the schedule of property delivered by Simms at the time of his discharge.

The whole schedule is in these words: "I have neither real or personal property, but what has been conveyed by a deed of trust to John Wise and Peter * Wise, jr., for the use of my [*368] creditors, as will appear, reference being had to the said deed."

He does not directly affirm that it is, or is not, his property. He might have taken the oath although he knew that the property contained in the deed remained in himself. The schedule, therefore, was not such as the law requires. The transaction is fraudulent upon the face of it.

The discharge, being granted by an incompetent tribunal, is wholly void.

Judgment reversed.

The United States *v.* Vowell and M'Clean.

5 C. 368.

Duties upon goods imported, do not accrue until their arrival at the port of entry.

The duty upon salt, which ceased with the 31st of December, 1807, was not chargeable upon a cargo which arrived within the collection district before that day, but did not arrive at the port of entry until the 1st of January, 1808.

Error to the circuit court for the District of Columbia, in an action of debt upon a bond given by the defendants in error to the United States, for duties on a cargo of salt from St. Ubes, which arrived and came to anchor within the collection district of Alexandria, sixteen miles below the town and port of Alexandria, on the 23d of Decem-

ber, 1807, but did not arrive at the port of Alexandria until the 1st of January, 1808.

The collector of Alexandria refused to permit the cargo to be landed until the duties were secured. Vowell contended that the salt was not subject to duty.

The facts being specially pleaded, and admitted in the replication, to which there was a general demurrer, the only question was, whether, as the duty upon salt ceased with the 31st of December, 1807, this cargo, which arrived within the district, but not at the

[*369] *port of Alexandria before the 1st of January, 1808, was liable to duty.

The court below was of opinion that it was not, and rendered judgment for the defendants, upon the demurrer.

The United States brought their writ of error.

Jones, for the United States.

[*370] * *C. Lee*, contrà.

[*372] * MARSHALL, C. J., delivered the opinion of the court, to the following effect:

The distinction taken by the counsel for the defendants in error, between a district and a port of entry, is correct. The duties did not accrue in the fiscal sense of the term, until the vessel arrived at the port of entry. If the question had been doubtful, the court would have respected the uniform construction which it is understood has been given by the treasury department of the United States upon similar questions. It is understood that in case of an increase of duty, the United States have always demanded and received the additional duty if the goods have not arrived at the port of entry before the time fixed for the commencement of such additional duty, although the vessel may have arrived within the collection district before that time. The same rule of construction is to be observed when there is a diminution of duty.

Judgment affirmed.

9 C. 104; 12 W. 419; 13 P. 486; 9 H. 372.

Sloop Sally v. The United States.

5 C. 372.

An appeal from the district court of the district of Maine, in a case of admiralty jurisdiction, does not lie directly to the supreme court of the United States, but to the circuit court for the district of Massachusetts.

In all cases where the district court of Maine acts as a district court, the appeal is to the circuit court for the district of Massachusetts.

This was an appeal from the sentence of the district court of the United States for the district of Maine, condemning the sloop Sally and cargo for violation of the revenue laws of the United States. The appeal was directly to this court.

* *Rodney*, Attorney-General, moved to dismiss the appeal. [*373]

* *C. Lee*, contrà. [*374]

But the Court was of opinion, that this not being a case where the district court was acting as a circuit court, the appeal ought to have been to the circuit court of Massachusetts.

Appeal dismissed.

DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1810.

THE JUDGES PRESENT AT THIS TERM, WERE

HON. JOHN MARSHALL, CHIEF JUSTICE.
HON. BUSHROD WASHINGTON,
HON. WILLIAM JOHNSON,
HON. BROCKHOLST LIVINGSTON, AND
HON. THOMAS TODD,
} ASSOCIATE JUSTICES.

JUDGES CUSHING and CHASE were prevented from attending by ill health.

SCOTT *v.* Negro BEN.

6 C. 3.

The right to freedom, under the act of Maryland which prohibits the bringing of slaves into that State, is not acquired by the neglect of the master to prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States, although such proof be required by the act.

ERROR to the judgment of the circuit court for the District of Columbia, sitting at Washington, upon a petition for freedom filed by negro Ben, against Sabrett Scott, who claimed the petitioner as his slave.

* The cause was argued by *C. Lee* and *Jones*, for the plaintiff [*5] in error, and by *Swann* and *F. S. Key*, for the defendant.

MARSHALL, C. J., delivered the opinion of the court, as follows, namely:

In this case three opinions were given by the circuit court, to each of which the defendant in that court excepted. These opinions were, in substance,

1. That the master of a slave imported into the State of Maryland, while the act, passed in the year 1783, entitled, "An act to prohibit the bringing slaves into this State," was in force, could not be admitted to prove the fact that such slave had resided three years, previous to his importation into Maryland, in some one of the United States, unless he could show that this fact had been proved to the satisfaction of the naval officer, or collector of the tax.

2. That a certificate made by the naval officer and collector of the port of Georgetown, dated on the 16th day of June, in the year 1807, certifying that this fact was proved to his satisfaction on that day, did not satisfy the law.

3. That a similar certificate given by the collector *of [*6] the tax for the county of Washington, did not satisfy the law.

The correctness of these opinions is to be tested by comparing them with the act under which the plaintiff in the court below claimed his freedom.

The enacting clause of that law prohibits the importation of slaves into the State of Maryland, and gives freedom to such as shall be imported contrary to that act. A proviso excepts from the operation of the enacting clause those slaves which, having resided for three years within some one of the United States, and being the property of the importer, should be imported into the State of Maryland by a person intending to become a resident thereof, and who should actually reside therein for the space of twelve months thereafter. The act then adds — and the residence of such slave in some one of the United States for three years as aforesaid, antecedent to his coming into this State, shall be fully proved to the satisfaction of the naval officer, or collector of the tax, by the oath of the owner, or some one or more credible witness or witnesses.

By the plaintiff in error it is contended, that this part of the law is directory; that it prescribes a duty to the importer of a slave within the description of the proviso, but does not make his title to that slave dependent on the performance of this duty.

By the defendant it is contended, that this clause forms a part of

the proviso, and that the fact of previous residence within some one of the United States can be proved by no other testimony, if that which is here prescribed be wanting.

The act, in its expression, is certainly ambiguous, and the one construction or the other may be admitted, without great violence to the words which are employed.

[*7] The great object of the proviso certainly was to * permit persons, actually migrating into the State of Maryland, to bring with them property of this description which had been within the United States a sufficient time to exclude the danger of its being imported into America for the particular purpose. The great object of the provision was, that the fact itself should accord with this intention. The manner in which that fact should be proved was a very subordinate consideration. Certainly the provisions of the law ought not to be so construed as to defeat its object, unless the language be such as absolutely to require this construction.

It would be a singular and a very extraordinary provision, that a naval officer, or the collector of a tax, should be made the sole judge of the right of one individual to liberty, and of another to property. It would be equally extraordinary that the oath of one of the parties, probably in the absence of the other, should be conclusive on such a question. It would be not less strange that the manner in which this *quasi* judge should execute his duty should not be prescribed, and that not even the attempt should be made to preserve any evidence of his judgment.

These considerations appear to the court to have great weight; and the language of the law ought to be very positive to deprive them of their influence.

Upon an attentive consideration of that language, the majority of the court is of opinion, that the property of the master is not lost by omitting to make the proof which was directed, before the naval officer, or the collector of the tax, and that the fact on which his right really depends may be proved, notwithstanding this omission.

The words of this part of the section do not appear to the court to be connected, either in their sense, or in their mode of expression, with the proviso. It is a distinct and a substantive regulation. In legislation, the conjunction "and" is very often used when

[*8] a provision is made in no degree dependent * on that which precedes it; and, in this case, no terms are employed which indicate the intention of the legislature, prescribing this particular duty, to make the right to the property dependent on the performance of that duty.

It is, then, the opinion of the majority of the court, that the fact of

the residence of the plaintiff below within the United States was open for examination, even had his master omitted entirely to make the proof of that residence before the naval officer, or collector of the tax, and, consequently, that the circuit court erred in refusing to admit testimony respecting that fact.

The opinion of the court on this point renders a decision on the other exceptions unnecessary.

FIELD and others *v.* HOLLAND and others.

6 C. 8.

An order in an equity suit, made by consent, that two persons be appointed "auditors," to examine certain accounts, does not make them referees.

Upon the report of auditors it was competent for the court, on exceptions filed, to look into the evidence in the cause, and to direct an issue, which it might afterwards revoke; and if without an express revocation the court proceed to find the facts, this amounts to an implied revocation.

To a bill by purchasers from the judgment debtor, to set aside a legal title to lands, obtained by the levy of an execution, upon the ground that the judgment was satisfied before the levy, both the judgment debtor and creditor are necessary parties, though the judgment creditor was not a purchaser under the levy.

Being made parties, the answer of the judgment creditor is evidence against the complainants; but the answer of the judgment debtor is not evidence in their favor against the other defendants.

Where a complainant has a right to an account, the court may refer the cause, either with or without instructions, as to the principles upon which it is to be taken.

If neither the debtor nor the creditor has made an application of payments, it devolves on the court to make it, and it being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious.

ERROR to the circuit court for the district of Georgia, in a chancery suit, in which Field, Hunt, Taylor, and Robinson, were complainants, and Holland, Melton, Tignor, Smith, Cox, and Dougherty, were defendants.

The decree of the court below dismissed the bill as to all the defendants. The material facts appear in the opinion of the court, and in the following extract from the opinion of the court below:

[*14] *"The only difficulty arises upon the application of sundry payments which the complainants contend extinguished the judgment, but which the defendant Holland, replies were applicable to other demands. The principle on which the court has determined to decree is this; that all payments shall be applied to debts existing when they were made, and as it appears that there were sundry demands of Holland's on Cox which were not secured by judg-

ment, that those sums shall be first extinguished, and the balance only applied to the judgments.

"This application of those payments is supported by general principles, as well as the particular circumstances of the case.

"1. The payer had a right at the time of payment to have applied it to which debt he pleased, where a number existed, but if he neglects to do so, generally, it rests in the option of the receiver to make the application. In this case Cox takes his receipts generally.

[*15] Even when the large payment *of $20,000 was made, he takes a receipt on account.

"2. It appears that the application of those payments has actually been made in the manner we adjudge; for from a letter of Mr. Vaughan, through whom most of the payments were made, he intimates that he had given up the evidences of several debts to Cox, because they had been satisfied. Such an act could only have been sanctioned by a knowledge on his part that the money paid through him was in part applicable to those debts."

[*16] *_Jones_ and _Harper_, for the plaintiffs in error.

[*18] *_F. S. Keye_ and _C. Lee_, contrà.

[*20] *MARSHALL, C. J., delivered the opinion of the court, as follows:

In this case some objections have been made to the regularity of the proceedings in the circuit court, which will be considered before the merits of the controversy are discussed.

In May term, 1803, the following order was made:

"By consent of parties, it is agreed, that William Wallace, James Wallace, and John Cumming, or any two of them, be appointed auditors, who shall have power to examine all papers and documents relative to payments made by Zachariah Cox, in satisfaction of judgments obtained by said Holland against said Zachariah, and charged in said bill to be satisfied, and that the testimony of John Vaughan, taken by complainants before Judge Peters, and now in the clerk's office, may be produced by them to said auditors. And it is further agreed, that said auditors may meet at any time after the first day of April next, and not before, on ten days' notice given to the adverse party."

The auditors returned the following report:

[*21] "We are of opinion, from the papers laid before *us, by both parties, that the judgments in the above case have been satisfied by payments made prior to February, 1796."

On exceptions this report was set aside.

By the plaintiffs in error it is contended, that the order under which the auditors proceeded was equivalent to a reference of the cause by consent, and that their report is to be considered as an award obligatory on all the parties, unless set aside for some of those causes which are admitted to vitiate an award. But this court is unanimously of opinion, that the view taken of this point by the plaintiffs is incorrect. The order in question bears no resemblance to a rule of court referring a cause to arbiters. It is a reference to "auditors," a term which designates agents or officers of the court, who examine and digest accounts for the decision of the court. They do not decree, but prepare materials on which a decree may be made. The order in this case, so far from implying that the decision of the auditors shall be made the decree of the court, does not even require, in terms, that the auditors shall form any opinion whatever. They are merely directed to examine all papers and documents relative to payments made in satisfaction of the judgments.

From the nature of their duty they were bound to report to the court, and to state the result of their examination, but this report was open to exception, and liable to be set aside. In the actual case the report was a very unsatisfactory one, and was, on that account, as well as on account of the objections to its accuracy, very properly set aside.

The cause was again referred to auditors, who reported that no evidence had been offered to them of payments to be credited on the judgments alleged by the plaintiffs to have been discharged.

The defendants insist that this report ought to *have ter- [*22]
minated the cause. But the court can perceive no reason for this opinion. If there were exhibits in the cause which proved that payments had been made, the plaintiffs ought not to be deprived of the benefit of those payments, because the auditors had not noticed the vouchers which established the fact.

The court, without making any order relative to this report, directed an issue for the purpose of ascertaining, by the verdict of a jury, the credits to which the plaintiffs were entitled.

It was completely in the discretion of the court to ascertain this fact themselves, if the testimony enabled them to ascertain it; or, if it did not, to refer the question either to a jury, or to auditors. There was, consequently, no error, either in directing this issue, or in discharging it.

But, without trying the issue, or setting aside the order, the court has made an interlocutory decree, deciding the merits of the case by specifying both the debits and credits which might be introduced into the account, and directing their clerk to state an account in conformity with that specification.

This interlocutory decree is undoubtedly an implied discharge of the order directing an issue, and is substantially equivalent to such discharge. Had the issue been set aside, in terms, in the body of the decree, or by a previous order, it would have been more formal, but the situation of the case and of the parties would have been essentially the same. The only real objection to the proceeding is, that the parties might not have been prepared to try the cause in court, in consequence of their expectation that it would be carried before a jury. There is, however, no reason to believe that this could have been the fact. Had there been any objection to a hearing on this ground, it would certainly have been attended to, and, if overruled, would have been respected by this court. But no objection

[*23] appears to have been made, and *the inference is, that the cause was believed to be ready for a trial.

These preliminary questions being disposed of, the court is brought to the merits of the case.

The plaintiffs claim title to a tract of land in the State of Georgia, under several mesne conveyances from Micajah Williamson, the original patentee. In the year 1793, while these lands were the property of Zachariah Cox, one of the defendants, two judgments were rendered against him in favor of John Holland, also a defendant, for the sum of 4,556*l.* sterling. These judgments remained in force until the year 1799, when executions were issued on them, which were levied on the lands of the plaintiffs held under conveyances from Cox, made subsequent to the rendition of the judgments. John Gibbons, the agent of the plaintiffs, objected to the sale, because the judgments were satisfied either in whole or in part, but as he failed to take the steps prescribed in such case by the laws of Georgia, the sheriff proceeded, and the lands were sold to Melton and others, who are also defendants in the cause.

This bill is brought to set aside the sale and conveyance made by the sheriff; and it also contains a prayer for general relief.

As the judgments constituted a legal lien on the lands in question, and the title at law passed to the purchasers by the sale and conveyance of the public officer, the plaintiffs must show an equity superior to that of the persons who hold the legal estate. That equity is, that the legal estate was acquired under judgments which were satisfied, and that sufficient notice was given to the purchasers to put them on their guard.

If the facts of the cause support this allegation, the equity of the plaintiffs must be acknowledged; but it is incumbent on them to make out their case.

[*24] *In the threshold of this inquiry, it becomes necessary to

meet an objection suggested by the plaintiffs relative to the testimony of the cause. It is alleged that neither Holland nor Cox are necessary or proper parties, and that their answers are both to be excluded from consideration.

The correctness of this position cannot be admitted. The whole equity of the plaintiffs depends on the state of accounts between Holland and Cox. They undertake to prove that the judgments obtained by Holland against Cox are satisfied. Surely to a suit instituted for this purpose, Holland and Cox are not only proper but necessary parties. Had they been omitted, it would be incumbent on the plaintiffs to account for the omission, by showing that it was not in their power to make them parties. Not only are they essential to a settlement of accounts between themselves, but, in a possible state of things, a decree might have been rendered against one or both of them. Neither is it to be admitted that the answer of Holland is not testimony against the plaintiffs. He is the party against whom the fact, that the judgments were discharged, is to be established, and against whom it is to operate. This fact, when established, it is true, affects the purchasers also, but it affects them consequentially, and through him. It affects them as representing him. Consequently, when the fact is established against or for him, it binds them.

The plaintiffs themselves call upon Holland for a discovery. They aver that the judgments were discharged, and expressly require him to answer this allegation. They cannot now be allowed to say that this answer is no testimony.

The situation of Cox is different. Though nominally a defendant, he is substantially a plaintiff. Their interest is his interest; their object is his object. He, as well as the plaintiffs, endeavors to show that the judgments were satisfied. He is not to be considered as really a defendant, nor does the *bill charge him [*25] with colluding to defraud the plaintiffs, or require him to answer the charge of contributing to the imposition alleged to have been practiced on them. It is not in the power of the plaintiffs, in such a case, to avail themselves of the answer of a party who is, in reality, though not in form, a plaintiff.

The answer of the defendant Holland, then, where it is responsive to the bill, is evidence against the plaintiffs, although the answer of Cox is not testimony against Holland.

The evidence in the cause, then, is the answer of Holland, the deposition of Vaughan, and the various exhibits and documents of debt which are found in the record. Does this testimony support the interlocutory decree which was rendered in May term, 1805?

That decree specifies the debits and credits which are to be allow-

ed, and directs a statement to be made showing how the account will stand, allowing the specified items.

To this order two objections may be made.

1. That it ought to have been more general. If this be overruled,
2. That its principles are incorrect.

Upon the first objection it is to be observed, that a court of chancery may, with perfect propriety, refer an account generally, and, on the return of the report, determine such questions as may be contested by the parties; or it may, in the first instance, decide any principle which the evidence in the cause may suggest, or all the principles on which the account is to be taken. The propriety of the one course or of the other depends on the nature of the case.

[* 26] Where items are numerous, the testimony questionable, the accounts complicated, the superior * advantage of a general reference, with a direction to state specially such matters as either party may require, or the auditors may deem necessary, will readily be perceived.

Where the account depends on particular principles which are developed in the cause, the convenience of establishing those principles before the report is taken will also be acknowledged.

The discretion of the judge will be guided by the circumstances of the case, and his decree ought not to be reversed because he has pursued the one course or the other, unless it shall appear either that injustice has been actually done, or that there is reason to apprehend it has been done.

In this case it might, perhaps, have been more satisfactory, had the parties been permitted to lay all their claims and all their objections before auditors, so that the precise points of difference between them, and the testimony upon those points, might be brought in a single view before the court.

But it is to be observed that two orders of reference had before been made, on neither of which was a satisfactory report obtained. That an issue had been directed, which had, for several terms, remained untried. The probability is, that the controversy depended less on items than on principles, and that all parties were desirous of obtaining from the court a decision of those principles: that no debits nor credits were claimed but those which were stated in the papers, and that all parties wished the opinion of the court on the effect and application of those items. Under such circumstances, a judge would feel much difficulty in withholding his opinion.

In such a case the justice of the cause could be defeated only by the exclusion of some item which ought to be admitted, or by an erroneous direction with respect to those items which were introduced.

* This court perceives in the record no evidence of any [* 27] credit to which the defendant Cox might be entitled, which is not comprehended in the recapitulation of credits allowed him in the circuit court, and they are the more inclined to believe that no such omission was made, as the fact would certainly have been suggested by the counsel for the plaintiffs, and the circumstances under which they claimed the item disallowed by the court, would have been spread upon the record. It is true, an additional credit is claimed in the assignment of errors; but the testimony in the record does not support this claim.

The majority of the court, therefore, is of opinion, that there is no error in the interlocutory decree, unless it shall appear that the principles it establishes are incorrect.

The items claimed by Holland, and allowed by the court, are supported by documents, the obligation of which has not been disproved.

There is, then, no question on the merits but this. Were the payments properly applied by the court, or were they applicable to the judgments?

The principle, that a debtor may control, at will, the application of his payments, is not controverted. Neither is it denied that, on his omitting to make this application, the power devolves on the creditor. If this power be exercised by neither, it becomes the duty of the court; and, in its performance, a sound discretion is to be exercised.

It is contended by the plaintiffs, that if the payments have been applied by neither the creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention.

The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which * that power devolves on the credit- [* 28] or, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious. That course has been pursued in the present case.

But it is contended, that bills for $20,000 were received, and have been applied in discharge of debts which became due two months afterwards.

If the receipt given for these bills purported to receive them in payment, this objection would be conclusive. If an immediate credit

was to be given for them, that credit must be given on a debt existing at the time, unless this legal operation of the credit should be changed by express agreement. But the receipt for these bills does not import that immediate credit was to be given for them. They are to be credited when paid. The time of receiving payment on them is the time when the credit was to be given; and, consequently, the power of application, which the creditor possessed, if no agreement to the contrary existed, was then to be exercised. It cannot be doubted that he might have credited the sums so received to any debt actually demandable at the time of receiving such sum, unless this power was previously abridged by the debtor.

It is contended that it was abridged; and that this is proved by the form of the receipt. The receipt states, that the bills, when paid, are to be credited on account of the demand of Holland against Cox, and the plaintiffs insist that the words import a single demand, and one existing at the time the receipt was given.

[* 29] This court is not of that opinion. The whole * debt due from one man to the other, may well constitute an aggregate sum not improperly designated by the term demand, and the receipt may very fairly be understood to speak of the demand existing when the credit should be given.

If the principles previously stated be correct, there is no evidence in the cause which enables this court to say that there was not due, on the judgments obtained by Holland against Cox, a sum more than equal to the value of the lands sold under execution. If so, the plaintiffs have no equity against the purchasers of those lands, whose conduct appears to have been perfectly unexceptionable; and the bill, both as to them and Holland, was properly dismissed.

It is the opinion of the majority of the court, that there is no error in the proceedings of the circuit court, and that the decree be affirmed.

6 P. 304.

The Maryland Insurance Company v. Woods.

6 C. 29.

Anti-neutral conduct forfeits the warranty of neutrality of the vessel in a policy.

Without such a warranty an attempt to enter a blockaded port does not put an end to the policy.

Under a policy containing a warranty of neutrality of the vessel, "proof of which to be

required in the United States only," a foreign sentence of condemnation for breach of blockade, is not conclusive evidence of breach of that warranty.

Where orders had been given to the blockading force not to capture a vessel, unless previously warned not to enter, the master is not bound to make inquiries elsewhere, but may sail for the port, expecting to inquire of the blockading squadron, if there.

Departure to learn whether a port, not of destination, is blockaded, is a deviation.

ERROR to the circuit court of the United States for the district of Maryland, in an action of covenant on two policies of insurance. The material exceptions, taken to the rulings of the circuit court appear in the opinion of the court.

*The verdict and judgment being in favor of the plaintiff, [*38] the defendants brought their writ of error.

P. B. Key and *Martin*, for the plaintiffs.

Harper, for the defendant.

*MARSHALL, C. J., delivered the following opinion of the [*42] court, namely:

This cause comes on upon various exceptions to opinions delivered by the circuit court of Maryland.

The first exception, having been taken by the party *who [*43] prevailed in the cause, is passed over without consideration.

The second and third exceptions are so intimately connected with each other, that they can scarcely be discussed separately.

This action was brought by the owners of the cargo of The William & Mary, to recover from the Maryland Insurance Company the amount of the policy insuring the cargo of that vessel. The voyage insured was "from Baltimore to Laguira, with liberty of one other neighboring port, and at, and from them, or either of them, back to Baltimore." The cargo was warranted to be American property, and the vessel to be an American bottom, "proof of which was agreed to be required in the United States only."

Previous to the sailing of The William & Mary from Baltimore, the blockade of Curraçoa had been notified to the President of the United States, by the British government, and was generally known in Baltimore. The vessel arrived at Laguira, from which place she sailed for some other port, was captured within thirty miles of the port of Amsterdam, in Curraçoa, then actually blockaded, and was condemned for an attempt to break the blockade.

The proof whether The William & Mary sailed from Laguira for Curraçoa, or for St. Thomas's or Porto Rico, is not positive; and the evidence respecting the information which she sought, or might have

received, at Laguira, respecting the blockade of Curraçoa, is contradictory. On the part of the plaintiff below, evidence was given that, at Laguira, information of this fact was sought and could not be obtained. On the part of the underwriters, evidence was given, that no inquiry respecting it was made at Laguira, and further, that there was a small island called Bonaire, between Laguira and Curraçoa, not much out of the track from the former
[* 44] place *to the port of Amsterdam, at which no inquiry respecting the blockade of Amsterdam was made.

The counsel for the underwriters prayed the court to instruct the jury, that if they believed these facts, the plaintiff could not recover.

This instruction the court refused to give, but did instruct the jury "that if they shall be satisfied, in this case, that Captain Henry Travers, master of the said schooner, sailed from Laguira for the port of Amsterdam, in the island of Curraçoa, with intent to enter the said port, if not actually blockaded, but, if blockaded, not to attempt to enter, but to sail for the island of St. Thomas's, and if the jury should be also satisfied, from the said evidence, that the said Henry Travers did not attempt to enter the said port, but was captured on his way to the said port, at the distance of twenty-nine or thirty miles therefrom, the court are of opinion, and accordingly directed the jury, that such conduct, on the part of the said Henry Travers, was not unlawful, and that, notwithstanding such conduct, the plaintiff can maintain the present action."

This opinion and direction of the circuit court asserts two principles of law.

1. That the sentence and condemnation of a foreign court of admiralty, condemning a vessel as prize for attempting to enter a blockaded port, is not conclusive evidence of that fact, in an action on this policy.

2. That, under the circumstances of the case, the sailing from Laguira, and the passing Bonaire, without making any inquiry, at either place, respecting the blockade of Amsterdam, were not such acts of culpable negligence as to discharge the underwriters.

1. Is the sentence of a foreign court of admiralty, in this case, conclusive evidence of the fact it asserts?

[* 45] *This depends entirely on the construction given to the policy. The question respecting the conclusiveness of a foreign sentence was, some time past, much agitated throughout the United States, and was finally decided, in this court, in the affirmative. Pending this controversy, a change was introduced in the form of the policy, at several offices, by inserting, after the warranty, that the property was neutral, the words, "proof of which to be required in the United States only."

By the underwriters it is contended that these words go to the property only, and not to the conduct of the vessel. By the assured it is contended that they apply to both.

The underwriters insist that the words themselves import no more than that proof respecting the property may be received in the United States, and that a more extended construction is not necessarily to be given to them in consequence of their connection with the warranty of neutrality, because a neutral vessel attempting to enter a blockaded port would thereby discharge the underwriters, although no warranty of neutrality should be found in the policy.

There is much force in this argument, and if the question shall ever occur on such a policy, it will deserve serious consideration. But whatever might be the law in such a case, the majority of the court is of opinion that, under this policy, the sentence of the foreign court of admiralty is not conclusive.

The contract of insurance is certainly very loosely drawn, and a settled construction, different from the natural import of the words, is given, by the commercial world, to many of its stipulations, which construction has been sanctioned by the decisions of courts. One of these is on the warranty that the vessel is neutral property. It is not improbable that, without such warranty, the attempt of a neutral *vessel to enter a blockaded port might be con- [* 46] sidered as discharging the underwriters. But no such decision appears ever to have been made; nor is the principle asserted, so far as is known to the court, in any of the numerous treatises which have been written on the subject. On the contrary, the judgments rendered in favor of the underwriters, in such cases, have been uniformly founded on the breach of the warranty of neutrality, which, though in terms extended only to the property, has been carried, by construction, to the conduct of the vessel. It is universally declared that anti-neutral conduct forfeits the warranty that the vessel is neutral.

This being the construction put by the parties, and, in consequence thereof, by courts, on the warranty of neutrality, it is fair to consider the reservation of the right of giving proof in the United States, which, in direct terms, refers to the whole warranty, as intended by the parties to be co-extensive with the warranty itself; and, as the conduct of the vessel was, in legal construction, comprehended in the warranty of her neutrality, that the conduct of the vessel would, in legal construction, be comprehended in the reservation of a right to make proof in the United States.

The majority of the court, therefore, is of opinion, that the circuit court did not err in submitting the testimony respecting the conduct of the vessel, in this case, to the jury.

2. Are the underwriters discharged by the conduct of the captain?

This question is susceptible of several subdivisions.

1. Was the port of Amsterdam, in Curraçoa, a neighboring port, within the policy?

2. Did the intention to pass Amsterdam, if blockaded, discharge the underwriters?

[* 47] *3. Was an omission to inquire at Laguira or Bonaire, respecting the blockade of Amsterdam, such a culpable negligence as to discharge the underwriters?

It is the opinion of the court that the port of Amsterdam was a neighboring port within the policy. The distance between the two places is inconsiderable. It is not stipulated that the neighboring port shall be one under the Spanish government, nor is it to be implied from the nature of the case. Indeed, the common usage of Baltimore, which was given in evidence, for vessels sailing with cargoes assorted for the Spanish Main to and from Laguira to Curraçoa, if refused admittance into the former port, would be conclusive on this point, if, in other respects, it could be doubtful.

Neither was the intention to sail for some other port, on the contingency of finding Amsterdam blockaded, a deviation.

It is admitted that the voyage from Laguira must be certain, and that only a certain voyage would be within the policy. But the opinion of the circuit court was founded on the jury's believing that the voyage from Laguira was for Amsterdam, a voyage which the vessel had a right to make, and that the intention to sail to another port, should Amsterdam be blockaded, constituted no deviation while on the voyage to Amsterdam.

Certainly an intention, not executed, will not deprive the insured of the benefit of his contract in a case in which he would not have been deprived of it, had he executed his intention. Had Captain Travers, on the voyage to Amsterdam, sustained a partial loss, and, after entering that port, determined to go to Porto Rico, or St. Thomas's, it is certain that, after sailing from Amsterdam, the voyage would have been no longer within the policy, nor would the underwriters have been answerable for a subsequent loss. But it

[* 48] could never be contended, with any *semblance of reason, that this discharged them from the loss sustained on the voyage to Amsterdam.

3. The omission of the captain to make any inquiry respecting the blockade of Amsterdam, at Laguira, or to call, for that purpose, at Bonaire, comes next to be considered.

The notoriety of the blockade of Curraçoa, before Captain Travers sailed from Baltimore, must affect him, especially as the instruc-

tion given to the jury is not made dependent on their believing that he had no actual knowledge of the fact. It seems a reasonable duty, in ordinary cases, to make inquiry in the neighborhood, if information be attainable, respecting the continuance of a blockade known previously to exist.

It is true, that upon this point, contradictory evidence was given; but the opinion of the court is predicated on the jury's believing that Captain Travers made no inquiry at Laguira. The correctness of that opinion, therefore, depends on its having been the duty of the captain to make this inquiry.

In an ordinary blockade, this, perhaps, might have been necessary; but it is contended, that blockades in the West Indies were so qualified by the British Government, as to have dispensed with this necessity.

It was proved, that orders had been given by that government, to its cruisers and courts of vice-admiralty, which orders were communicated to, and published by, the government of the United States, "Not to consider blockades as existing, unless in respect to particular ports which may be actually invested, and then not to capture vessels bound to such ports, unless they shall have been previously warned not to enter them."

On the motives for this order, on the policy which *dic- [*49]
tated this mitigation of the general rule, so far as respected blockades in the West Indies, this court does not possess information which would enable it to make any decision, but it appears essentially to vary the duty of the masters of neutral vessels sailing towards a port supposed to be blockaded.

The words of the order are not satisfied by any previous notice which the vessel may have obtained, otherwise than by her being warned off. This is a technical term which is well understood. It is not satisfied by notice received in any other manner. The effect of this order is, that a vessel cannot be placed in the situation of one having a notice of the blockade until she is warned off. It gives her a right to inquire of the blockading squadron, if she shall not previously receive this warning from one capable of giving it, and, consequently, dispenses with her making that inquiry elsewhere. While this order was in force, a neutral vessel might lawfully sail for a blockaded port, knowing it to be blockaded, and being found sailing towards such port, would not constitute an attempt to break the blockade, until she should be warned off.

There is, then, no error in the opinions to which the second and third exceptions are taken.

The fourth exception is taken to the refusal of the court to give an

opinion to the jury, that, under the circumstances stated by the defendants below, the port of Curraçoa was not a neighboring port within the policy.

The merits of this opinion have been essentially discussed in the view taken of the second and third exceptions, and need not be repeated. The port of Curraçoa is considered as a port within the policy, and, consequently, the circuit court ought not to have given the opinion prayed for by the plaintiffs in error.

[*50] *The fifth exception presents the extraordinary case of an exception to an opinion in favor of the party taking it, and, consequently, need not be examined.

The sixth exception presents a case not essentially varying from the second and third, and will therefore be passed over without other observation than that it is decided in the opinion on those exceptions.

The seventh exception is to a different point. The counsel for the defendants below prayed the court to instruct the jury, "that if they believed the said Travers sailed from Laguira on a voyage to St. Thomas's, or Porto Rico, but with an intention to proceed a small distance out of the way to see if Amsterdam was blockaded, and in case it was not blockaded, then to enter that port, and did so proceed to the port of Amsterdam, and was captured as aforesaid, then the defendants are not answerable."

This opinion the court refused to give, and proceeded to repeat the instruction to which the second and third exceptions were taken.

If St. Thomas's, or Porto Rico, were not neighboring ports within the policy, as is most probably the fact, then the voyage from Laguira to either of those places was not insured. If they were neighboring ports, so that a voyage to either of them was within the policy, then going out of the way to see whether Amsterdam was blockaded was a deviation, and of consequence, the underwriters are equally discharged.

The only doubt ever felt on this point, was, whether any testimony had been offered to the jury to establish this fact, which would authorize counsel to request the opinion of the court respecting the law. On examining the record, it appears that such testimony was offered. It is stated that the defendants below offered in evidence, that the captain, on finding he could not be permitted to dispose of his cargo at Laguira, but on terms which amounted to a to-

[*51] tal sacrifice of it, "determined to proceed to *Porto Rico, and, as Curraçoa was very little out of the course, to ascertain whether the blockade still continued."

This evidence might be disbelieved by the jury, but the defend-

ants were certainly entitled to the opinion of the court declaring its legal operation if believed.

It is the opinion of the court, that, in refusing to give the opinion prayed in the seventh exception, the circuit court erred, for which their judgment is reversed, and the cause remanded for a new trial.

14 H. 351.

YOUNG *v.* GRUNDY.

6 C. 51.

No writ of error or appeal lies to an interlocutory decree dissolving an injunction.

If the answer neither admits nor denies the allegations of the bill, they must be proved on the final hearing; but upon a question of dissolution of an injunction they are to be taken to be true.

THIS was an appeal from an interlocutory decree of the circuit court of the District of Columbia, dissolving an injunction.

E. J. Lee, for the appellant.

The material facts of the bill are not denied nor admitted by the answer; they are, therefore, to be taken as true. The court below must, therefore, have proceeded on the ground that the original equity between the maker and payee of the note did not affect the indorsee.

MARSHALL, C. J. If the answer neither admits nor denies the allegations of the bill, they must be proved upon the final hearing. Upon a question of dissolution of an injunction they are to be taken to be true.

But the court has no doubt upon the question.

*No appeal or writ of error will lie to an interlocutory [*52] decree dissolving an injunction.

Writ of error dismissed, with costs.

16 P. 162.

WILSON, *Ex parte.*

6 C. 52.

The writ of *habeas corpus ad subjiciendum* does not lie to bring up a person confined in the prison bounds upon a *ca. sa.* issued in a civil suit.

WILSON petitioned the court for a writ of *habeas corpus*, and a *certiorari* to bring up the record of a civil cause in which judgment had been rendered against him, upon which a *ca. sa.* had issued, by which he was taken and was now in confinement within the prisons bounds upon a prison-bounds bond. His petition stated that the marshal had demanded of the creditor the daily allowance for the prisoner agreeably to the act of congress, concerning insolvent debtors within the District of Columbia, (1 Stats. at Large, 265,) which the creditor had refused to pay, in consequence of which the marshal had no longer any authority to detain him.

The marshal refused to discharge the petitioner; and his counsel, *E. J. Lee*, now moved for a *habeas corpus*.

MARSHALL, C. J., after consultation with the other judges,
[* 53] stated that the court was not satisfied * that a *habeas corpus* is the proper remedy, in a case of arrest under a civil process.

Habeas corpus refused.

ONEALE *v.* THORNTON.

6 C. 53.

The act of assembly of Maryland, which authorized the commissioners of the city of Washington to resell lots for default of payment by the first purchaser, contemplates a single resale only; and by that resale the power given by the act is executed.

By selling and conveying the property to a third purchaser, the commissioners precluded themselves from setting up the second sale, and the second purchaser, by making this defence, affirmed the title of the third purchaser.

ERROR to the circuit court for the District of Columbia. The material facts appear in the opinion of the court.

P. B. Key, and *F. S. Key*, for the plaintiff.

Rodney, and *Jones*, for the defendant.

* MARSHALL, C. J., delivered the opinion of the court, as [*66] follows:

This suit was instituted on a promissory note given by the plaintiffs in error, to the commissioners of the city of Washington, in payment for two lots originally sold to Morris and Greenleaf, and resold to the plaintiff in consequence of the failure of the original purchasers to pay the purchase-money. The defendant having also failed to pay the purchase-money, the lots were again resold by the superintendent, who succeeded to the powers of the commissioners, and were conveyed to the assignee of the third purchaser. Oneale, the defendant in the circuit court, contended that, by this subsequent sale and conveyance, a total failure of the consideration for which the note was given has been produced by the act of the creditor, and that he is consequently discharged from paying the note. This point having been decided against him, he has brought a writ of error to the judgment of the circuit court, and insists here, as in the court below,

1. That the consideration on which the note was given has totally failed, and that this failure is produced by the illegal conduct of the agent for the city.

In support of the judgment of the circuit court it is contended;

1. That the act of the legislature for the State of Maryland, under which both resales purport to have been made, authorizes a third sale on the failure * of the purchaser at the second [*67] sale to discharge his note.

2. If this be otherwise, that such subsequent sale could not affect the right of Oneale, whose title would still be good.

The first point depends on the second section of the act entitled a further supplement to the act "concerning the territory of Columbia, and the city of Washington."

This act enables the commissioners to sell at public vendue any lots sold by them on credit, if the purchaser shall fail to pay the purchase-money thirty days after the same shall become due, and to "retain in their hands sufficient of the money, produced by such new sale, to satisfy all principal and interest due by the first contract, together with the expenses, &c., and the original purchaser, or his assigns, shall be entitled to receive from the said commissioners, at their treasury, on demand, the balance of the money which may have been actually received by them, or under their order, on the second

sale, and all lots, so sold, shall be freed and acquitted of all claim legal and equitable, of the first purchaser, his heirs and assigns."

It has been argued, that the terms of this section allow a resale so long as the purchaser shall fail to pay the purchase-money, and that every purchaser, so failing, remains liable for his note, notwithstanding such resale.

But this court is of opinion, that a single resale only is contemplated by the legislature, and that by such resale, the power given by the act is executed.

The proposition, that a power to resell, if not restricted by the terms in which it is granted, implies a gift of all the power possessed at the original sale, will not be denied; but the court is of opinion, that in this case, the power of reselling is restricted by the

[*68] *words which confer it. These words are such as, in their literal meaning, apply exclusively to a first and second sale. The words, "first contract," "original purchaser," and "first purchaser," designate, as expressly and exclusively as any words our language furnishes, the first sale made of the property, and the purchaser at that sale, and no other. It is true, that the natural import of words may be affected by the context, and that where other parts of the statute demonstrate an intent different from that which the words of a particular section of themselves would import, such manifest intent may be admitted to give to the words employed a less obvious meaning. But, in this statute, no such intent appears.

Men use a language calculated to express the idea they mean to convey. If the legislature had contemplated various and successive sales, so that any intermediate contract or purchaser was within the view of the lawmaker, and intended to be affected by the power of resale given to the commissioners, the words employed would have been essentially different from those actually used. We should certainly have found words in the act applicable to the case of such intermediate contract. But we find no such terms; and the want of them might, in the event of different sales, for different prices, produce difficulties scarcely to be surmounted. No man, intending to draw a law for the purpose of giving the commissioners a continuing power to resell as often as default in payment should be made by the purchaser, could express that intention in the language of this act.

It has been argued, by the defendants in error, that every subsequent default would produce the same necessity for reselling again, that was produced by the default of the original purchaser, and that therefore the legislature, if their words will permit it, ought to be considered as having given the same remedy.

*The influence readily conceded to this argument in general cases, is much impaired, if not entirely destroyed, by the particular circumstances attending this law. [*69]

A contract for 6,000 lots was concluded on the day that this act passed, immediately after its passage. In this large contract was merged a former contract for 3,000 lots made with one of the purchasers in this second contract. It is impossible to reflect on this fact without being persuaded that the law was agreed upon by the parties to this contract, and was specially adapted to it. The immensity of the property disposed of by this sale, furnished motives for legislative aid by giving a speedy remedy to the commissioners which might not exist on the resale of particular lots occasioned by any partial default in the purchasers. In consideration of the magnitude of the contract, the lots would, according to the ordinary course of human affairs, rate lower than in cases of a few sold to individuals. Consequently it could never enter the mind of the commissioners, or of the legislature, that one of these lots resold would not command a much higher price than the estimate made of it in the original contract. We therefore find no provision made, in the law, for the event of a lot's selling for a less sum, when resold, than was originally given for it. This furnishes additional inducements to the opinion, that the legislature considered itself as having done as much as the State or the city required, by giving this summary remedy for the default of the first purchaser, and leaving the parties afterwards to the ordinary course of law.

It is, then, the opinion of the court, that the act of assembly, under which the superintendent has acted, did not authorize the resale to Ross of the lots which had been previously resold to Oneale.

It remains, then, to inquire whether this sale and conveyance so affects the title of Oneale, as to produce a failure of the consideration on which the note was given.

*In this case, the impropriety, which has occurred in consequence of an agent's misconstruing his powers, is a fact *dehors* the title papers: it is not apparent on the face of the conveyances. They purport to pass a title which is entirely unexceptionable. How far such a conveyance may be valid in law, or how far it may be affected in equity by actual or implied notice to such subsequent purchaser, this court will not now decide. [*70]

The city, by reselling the property, and conveying it to the purchaser, (an act to be justified by no state of things but the nullity of the previous sale,) has not left itself at liberty to maintain the continuing obligation of that sale; and the plaintiff, by setting up this defence, has affirmed the title of the last purchaser.

This court is of opinion, that the city has disabled itself from complying with its contract, and that, on the testimony in the cause, the plaintiff below ought not to have recovered.

Judgment reversed.

[*71] *KING *v.* THE DELAWARE INSURANCE COMPANY.

6 C. 71.

If a voyage is abandoned by reason of fear of seizure founded on false information, no real cause for seizure existing, underwriters on freight are not liable.

Whether a certain state of facts, justifies the master in breaking up a voyage, and if so, whether the cause is a peril within the policy, are questions of law.

ERROR to the circuit court of the United States for the district of Pennsylvania, in an action of covenant upon a policy of insurance upon the freight of The Venus, from Philadelphia, to the Isle of France. The material facts appear in the opinion of the court.

Harper and *Ingersoll, jr.*, for the plaintiff.

Binney and *Hopkinson*, for the defendant.

[*78] *MARSHALL, C. J., delivered the opinion of the court, as follows:

This suit was instituted on a policy insuring the freight of The Venus, from Philadelphia to the Isle of France. The vessel sailed early in December, 1807, before the British orders in council, of the preceding November, were known in the United States. On the afternoon of the 16th of January, 1808, while prosecuting her voyage, she met the British ship of war Wanderer, by whom she was arrested and detained until the morning of the 18th, when she was restored to the captain, her papers being first indorsed with these words, "Ship Venus warned off the 18th of January, 1808,
[*79] by H. M. S. Wanderer, from proceeding *to any port in possession of his majesty's enemies."

EDWARD MEDLEY, second lieutenant.

The captain was verbally informed by an officer of The Wanderer, that the Isle of France was blockaded, and that The Venus would be a good prize if she proceeded thither.

The captain returned to Philadelphia, where he was disabled from

prosecuting his voyage by the embargo. Considering the voyage as broken up, by the arrest and detention of his vessel by The Wanderer, he on that account abandoned to the underwriters.

The principal question arising on this case is, was the captain of The Venus justified in returning to Philadelphia, after having proceeded about one thousand miles on his voyage, either by the indorsement on his papers, or the verbal information given by an officer of The Wanderer?

A point preliminary to the examination of this question on its merits has been made by the plaintiff in error.

The jury have found, that "by the interruption, detainment, and warning off of the British force, the voyage of the said ship Venus was broken up."

After stating the verbal information given by the British officer respecting the blockade of the Isle of France, is this further finding: "We find, in consequence thereof, that the said Elisha King was fully justified in returning to the port of Philadelphia."

These findings, it is urged, conclude the court, and render this special verdict equivalent to a general one.

But this court is not of that opinion. It has been truly said, that finding the breaking up of the voyage finds nothing. The question recurs, was the voyage broken up by one of the perils insured against, or by *the fault of the captain? The answer [*80] to this question determines the liability of the underwriters.

It has been also truly said that the question of justification is a question of law, not of fact. If, as in this case, the jury find the fact specially, and draw the legal conclusion that the fact amounts to a justification, the court is not bound by that conclusion.

The case, then, is open to examination on its real merits, unaffected by the particular findings which have been noticed.

In proceeding to inquire whether the circumstances which actually occurred, justified the captain of The Venus in returning to Philadelphia, it becomes important to ascertain the real hazard of prosecuting his voyage. This essentially depends on the construction of the British orders of council issued in November, 1807. By the plaintiff in error it is insisted, that these orders extend to the direct trade between a neutral port and the colony of an enemy. In support of this construction, a very acute and elaborate criticism has been bestowed on those orders, which appears to the court merely to furnish additional proof of the imperfection of all human language. The intent of the orders to exclude from their operation this direct trade, an intent alike manifested by the context, and by the particular words forming the exception, the universal understanding of both

countries, which has been, on more than one occasion, publicly and officially expressed, are too conclusive on this point to render it necessary that the court should proceed to review that analysis of this document which has been so well made at the bar.

According to the construction contended for by the plaintiffs in error, an exception professedly made to mitigate the rigor of the general rule, "and still to allow to neutrals the opportunity of furnishing themselves with colonial produce for their own consumption and supply," would be more rigorous than the rule
[*81] itself, and would interdict that trade by which *they were to be supplied with this produce for their own use, with as jealous circumspection as the trade professedly prohibited by the general rule.

It is, then, the clear and unanimous opinion of the court, that the words "shall have," which are used in the exception, relate as well to the time of capture, as to the time of issuing the orders, and that a direct voyage from the United States to a colony of France, was not prohibited.

It being found that the Isle of France was not actually blockaded, and the orders not prohibiting the voyage, it remains to inquire whether the apprehension excited by the warning, or by the verbal communication of a British officer, justified the return of The Venus to Philadelphia.

It has been very truly observed that, in this case, The Venus was not physically incapacitated from prosecuting her voyage.

With equal truth has it been observed, that there was no legal impediment to her proceeding, because the voyage was not prohibited by the orders of November, 1807; and, consequently, the indorsement on her papers would not have increased the danger.

There did not, then, at the time the voyage was abandoned, exist, either in fact, or in law, the restraint or detention, against which the underwriters insured. From fear, founded on misrepresentation, the voyage was broken up, and the vessel returned to her port of departure.

Whether this might be justified under any circumstances it is unnecessary to determine. But the court is of opinion that the circumstances of this case did not justify it. The Venus might have proceeded, and ought to have proceeded, until she could obtain further information. It would be dangerous in the extreme if any
[*82] false intelligence received on a voyage *might justify a captain in acting as if that intelligence were true.

The case of Blackenhagen v. The London Assurance Company, 1 Camp. 454, has a strong bearing on this case, and though that was

a decision at *nisi prius*, it is entitled to all the respect which is due to the court of common pleas. After the same opinion had been successively given by Lord Ellenborough, and by Sir James Mansfield, it was affirmed by the whole court, and the jury having found against the opinion of the judge, a new trial was granted.

The court gives no opinion on the question how far the underwriters would have been liable, had the orders of council prohibited the trade to the Isle of France. This decision is not intended in any manner to affect that question.

Judgment affirmed, with costs.

LEWIS *v.* HARWOOD.

6 C. 82.

A bond in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable, under the statute of Virginia.

ERROR to the circuit court of the United States for the district of Virginia. The material facts are stated in the opinion of the court.

Terrell, and *Swann*, for the plaintiff.

* LIVINGSTON, J., delivered the opinion of the court, as fol- [* 83]
lows:

On the 3d day of February, 1784, the * plaintiff executed [* 84]
his bond to William Whetcroft, in the penal sum of 6,000*l.*
to which there is a condition in the following words: "The condition of the above obligation is such, that if the said John Lewis shall well and truly pay to the said William Whetcroft the full sum of 3,000*l.*, current money of Virginia, on or before the first day of January, 1785, then this obligation to be void. Provided, and it is to be understood, that in case the said Lewis, on application by the said Whetcroft to him, in the town of Fredericksburg, on or after the said first day of January, shall pay unto the said William, or his attorney, the sum of 3,000*l.* in officers' certificates issued under an act of assembly passed November, 1781, for pay or arrearages of pay and depreciation, or shall well and truly pay the interest of six per cent. from the date hereof, on the said certificates, if not paid, and

shall moreover annually and punctually pay the said six per cent. when applied to as before mentioned, in doing of which the condition of this bond is dischargeable by payment of the said 3,000*l.* officers' certificates; otherwise the bond shall have its full force and effect."

This bond was assigned to the defendant on the 3d of August, 1790, and an action at law was brought on in the name of the assignee in the circuit court of the United States for the district of Virginia, when judgment was rendered for the defendant.

On this judgment a writ of error has been sued out, and the plaintiff alleges that the same should be reversed, because the bond on which this action is brought is not assignable under the laws of Virginia, so as to enable the assignee to prosecute at law in his own name. Other causes of error have been assigned, but the opinion of the court being with the plaintiff on the first point, it will not be necessary to take any notice of the objections which have been made to the pleadings, or to the imperfect finding of the jury.

[* 85] * A bond not being assignable at common law, the present question must turn altogether on the statutes of Virginia. It seems to have been for a long time doubted, after passing the act of 1748, c. 27, whether any but bonds conditioned to pay money or tobacco were assignable. That question was, however, at last settled by the court of appeals, in the case of Henderson *v.* Hepburn, in which it was decided, that a bond with a collateral condition was not, within the meaning of this act, assignable. With this decision the court not only feels no inclination to interfere, but thinks it a fair and just exposition of the acts which had then been passed on this subject. The bonds intended by the legislature were most clearly such as were to become void on the payment of a sum certain, and where no intervention or assessment of a jury was necessary. Bonds which require particular breaches to be assigned, damages on which were to be estimated or liquidated by a jury, do not appear to have been contemplated.

It being then settled that bonds with collateral conditions were not assignable under the laws in force at the time of the making of this assignment, it only remains to ascertain the true character of the condition of the bond on which this action is brought.

Although by payment of 3,000*l.*, on or before a certain day, the obligor might have discharged himself from the penalty, it was part of the condition that, on the application of the obligee, by a certain day, a payment in certain certificates, which were not money, might be substituted. This created an alternative by which the penalty might be discharged either by money or officers' certificates; and although the consent of both parties might be necessary to a pay-

ment in the latter way, still, as it made part of the written contract, the court cannot but perceive that, on a certain contingency, it was to be considered as a bond on which it might, as it did, become necessary to assign breaches and call in a jury to assess damages. If we look at the record, we shall find the * parties, their counsel and the jury treating it as a bond of this description. [* 86]

It is the opinion, therefore, of the court, that this bond was not assignable under the laws of Virginia, and that the judgment of the circuit court for the district of Virginia must be reversed, and judgment on the verdict be arrested.

Riddle and Company *v.* Mandeville and Jamesson.

6 C. 86.

The court below, upon a mandate on reversal of its judgment, may award execution for the costs of the appellant in that court.

A MANDATE had been issued upon the reversal of a decree in this case at the last term, in which, "this court, proceeding to give such decree as the said circuit court ought to have given, doth decree and order, that the defendants pay to the plaintiffs the sum of $1,500, that being the amount of the note in the bill mentioned, together with interest thereon from the time the same became due, you are hereby commanded, that such execution and proceedings be had on the said decree of the said supreme court, as, according to equity and justice, and the laws of the United States, ought to be had, the said writ of error notwithstanding."

Nothing having been said respecting the costs, the court below had not issued execution for the costs of the appellant.

E. J. Lee moved the court for a further mandate to the court below, to award the costs of that court.

MARSHALL, C. J. The court below is always competent to award costs in a chancery suit in that court, and, in case of a mandate, may issue execution therefor.

2 P. 331.

[* 87] * FLETCHER *v.* PECK.

6 C. 87.

An averment in a declaration, that the legislature had no authority to convey, is not answered by a plea that the governor had authority to convey.

It is not necessary that a breach should be assigned in the very words of a covenant; it is sufficient if a substantial breach is unequivocally shown.

By consent, pleadings were amended in this court, and the cause again heard, on the amended pleadings.

Before a law can be pronounced unconstitutional, its incompatibility with the constitution must be clear.

By the constitution of Georgia, of 1789, the legislature had power to dispose of the unappropriated lands within its limits.

If a court of law can, in any case, inquire into the motives of members of the legislature for voting for a law, it can not do so collaterally, in a suit between individuals, to which the State is not a party.

If a legislature make a grant of lands in fee simple, a subsequent legislature can not take away the title of a *bonâ fide* purchaser for a valuable consideration from the first grantee, upon the ground that the grant to the latter was fraudulent.

When a law is a contract, a repeal of that law can not take away rights vested under that contract.

A grant, made in pursuance of a contract, is an executed contract, and its obligations can not be impaired by a law of a State.

A grant implies a contract by the grantor, not to reassert the title granted.

Contracts made by a State, are within the Constitution of the United States.

The lands in question, in this case, did belong to the State of Georgia, and not to Carolina, or the United States.

An unextinguished Indian title to these lands, was not absolutely inconsistent with a seizin in fee by the State.

ERROR to the circuit court of the United States for the district of Massachusetts, in an action of covenant brought by Fletcher against Peck.

The substance of the original pleadings, on which the first opinion was given, and of the amended pleadings, and the special verdict, on which the second opinion was given, are stated in those opinions.

[* 114] * The plaintiff sued out his writ of error, and the case was twice argued, first by *Martin*, for the plaintiff in error, and

[* 115] by *J. Q. Adams*, and *R. G. Harper*, for the * defendant, at February term, 1809, and again at this term by *Martin*, for the plaintiff, and by *Harper* and *Story*, for the defendant.

[* 125] * *March* 11, 1809. MARSHALL, C. J., delivered the opinion of the court upon the pleadings, as follows:

In this cause there are demurrers to three pleas filed in the circuit

court, and a special verdict found on an issue joined on the 4th plea. The pleas were all sustained, and judgment was rendered for the defendant.

To support this judgment, this court must concur in overruling all the demurrers; for, if the plea to any one of the counts be bad, the plaintiff below is entitled to damages on that count.

The covenant, on which the breach in the first count is assigned, is in these words: "that the legislature of the said State, (Georgia,) at the time of the passing of the act of sale aforesaid, had good right to sell and dispose of the same, in manner pointed out by the said act."

The breach of this covenant is assigned in these words: "now the said Fletcher saith that, at the time when the said act of the legislature of Georgia, entitled an act, &c., was passed, the said legislature had no authority to sell and dispose of the tenements aforesaid, or of any part thereof, in the manner pointed out in the said act."

*The plea sets forth the constitution of the State of [*126] Georgia, and avers that the lands lay within that State. It then sets forth the act of the legislature, and avers that the lands, described in the declaration, are included within those to be sold by the said act; and that the governor was legally empowered to sell and convey the premises.

To this plea the plaintiff demurred; and the defendant joined in the demurrer.

If it be admitted that sufficient matter is shown, in this plea, to have justified the defendant in denying the breach alleged in the count, it must also be admitted that he has not denied it. The breach alleged is, that the legislature had not authority to sell. The bar set up is, that the governor had authority to convey. Certainly an allegation, that the principal has no right to give a power, is not denied by alleging that he has given a proper power to the agent.

It is argued that the plea shows, although it does not, in terms, aver, that the legislature had authority to convey. The court does not mean to controvert this position, but its admission would not help the case. The matter set forth in the plea, as matter of inducement, may be argumentatively good, may warrant an averment which negatives the averment in the declaration, but does not itself constitute that negative.

Had the plaintiff tendered an issue in fact upon this plea, that the governor was legally empowered to sell and convey the premises, it would have been a departure from his declaration; for the count to which this plea is intended as a bar alleges no want of authority in the governor. He was therefore under the necessity of demurring

But it is contended that although the plea be substantially bad, the judgment, overruling the demurrer, is correct, because the declaration is defective.

[* 127] The defect alleged in the declaration, is, that the * breach is not assigned in the words of the covenant. The covenant is, that the legislature had a right to convey, and the breach is, that the legislature had no authority to convey.

It is not necessary that a breach should be assigned in the very words of the covenant. It is enough that the words of the assignment, show, unequivocally, a substantial breach. The assignment under consideration does show such a breach. If the legislature had no authority to convey, it had no right to convey.

It is, therefore, the opinion of this court, that the circuit court erred in overruling the demurrer to the first plea by the defendant pleaded, and that their judgment ought therefore to be reversed, and that judgment on that plea be rendered for the plaintiff.

After the opinion of the court was delivered, the parties agreed to amend the pleadings, and the cause was continued for further consideration.

The cause having been again argued at this term,

March 16, 1810. MARSHALL, C. J., delivered the opinion of the court as follows:

The pleadings being now amended, this cause comes on again to be heard on sundry demurrers, and on a special verdict.

This suit was instituted on several covenants contained in a deed made by John Peck, the defendant in error, conveying to Robert Fletcher, the plaintiff in error, certain lands which were part of a large purchase made by James Gunn and others, in the year 1795, from the State of Georgia, the contract for which was made in the form of a bill passed by the legislature of that State.

[* 128] The first count in the declaration set forth a breach * in the second covenant contained in the deed. The covenant is, "that the legislature of the State of Georgia, at the time of passing the act of sale aforesaid, had good right to sell and dispose of the same in manner pointed out by the said act." The breach assigned is, that the legislature had no power to sell.

The plea in bar sets forth the constitution of the State of Georgia, and avers that the lands sold by the defendant to the plaintiff, were within that State. It then sets forth the granting act, and avers the power of the legislature to sell and dispose of the premises as pointed out by the act.

To this plea the plaintiff below demurred, and the defendant joined in demurrer.

That the legislature of Georgia, unless restrained by its own constitution, possesses the power of disposing of the unappropriated lands within its own limits, in such manner as its own judgment shall dictate, is a proposition not to be controverted. The only question, then, presented by this demurrer, for the consideration of the court, is this, did the then constitution of the State of Georgia prohibit the legislature to dispose of the lands, which were the subject of this contract, in the manner stipulated by the contract?

The question, whether a law be void for its repugnancy to the constitution, is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case. The court, when impelled by duty to render such a judgment, would be unworthy of its station, could it be unmindful of the solemn obligations which that station imposes. But it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

In this case the court can perceive no such opposition.
In the constitution of Georgia, adopted in the *year 1789, [*129] the court can perceive no restriction on the legislative power, which inhibits the passage of the act of 1795. They cannot say that, in passing that act, the legislature has transcended its powers, and violated the constitution.

In overruling the demurrer, therefore, to the first plea, the circuit court committed no error.

The 3d covenant is, that all the title which the State of Georgia ever had in the premises had been legally conveyed to John Peck, the grantor.

The 2d count assigns, in substance, as a breach of this covenant, that the original grantees from the State of Georgia promised and assured divers members of the legislature, then sitting in general assembly, that if the said members would assent to, and vote for, the passing of the act, and if the said bill should pass, such members should have a share of, and be interested in, all the lands purchased from the said State by virtue of such law. And that divers of the said members, to whom the said promises were made, were unduly influenced thereby, and, under such influence, did vote for the passing of the said bill; by reason whereof the said law was a nullity,

&c., and so the title of the State of Georgia did not pass to the said Peck, &c.

The plea to this count, after protesting that the promises it alleges were not made, avers, that until after the purchase made from the original grantees by James Greenleaf, under whom the said Peck claims, neither the said James Greenleaf, nor the said Peck, nor any of the mesne vendors between the said Greenleaf and Peck, had any notice or knowledge that any such promises or assurances were made by the said original grantees, or either of them, to any of the members of the legislature of the State of Georgia.

To this plea the plaintiff demurred generally, and the defendant joined in the demurrer.

[*130] *That corruption should find its way into the governments of our infant republics, and contaminate the very source of legislation, or that impure motives should contribute to the passage of a law, or the formation of a legislative contract, are circumstances most deeply to be deplored. How far a court of justice would, in any case, be competent, on proceedings instituted by the State itself, to vacate a contract thus formed, and to annul rights acquired, under that contract, by third persons having no notice of the improper means by which it was obtained, is a question which the court would approach with much circumspection. It may well be doubted how far the validity of a law depends upon the motives of its framers, and how far the particular inducements, operating on members of the supreme sovereign power of a State, to the formation of a contract by that power, are examinable in a court of justice. If the principle be conceded, that an act of the supreme sovereign power might be declared null by a court, in consequence of the means which procured it, still would there be much difficulty in saying to what extent those means must be applied to produce this effect. Must it be direct corruption, or would interest or undue influence of any kind be sufficient? Must the vitiating cause operate on a majority, or on what number of the members? Would the act be null, whatever might be the wish of the nation, or would its obligation or nullity depend upon the public sentiment?

If the majority of the legislature be corrupted, it may well be doubted, whether it be within the province of the judiciary to control their conduct, and, if less than a majority act from impure motives, the principle by which judicial interference would be regulated, is not clearly discerned.

Whatever difficulties this subject might present, when viewed under aspects of which it may be susceptible, this court can perceive none in the particular pleadings now under consideration.

This is not a bill brought by the State of Georgia, to annul the contract, nor does it appear to the court, by *this [*131] count, that the State of Georgia is dissatisfied with the sale that has been made. The case, as made out in the pleadings, is simply this. One individual who holds lands in the State of Georgia, under a deed covenanting that the title of Georgia was in the grantor, brings an action of covenant upon this deed, and assigns, as a breach, that some of the members of the legislature were induced to vote in favor of the law, which constituted the contract, by being promised an interest in it, and that therefore the act is a mere nullity.

This solemn question cannot be brought thus collaterally and incidentally before the court. It would be indecent, in the extreme, upon a private contract, between two individuals, to enter into an inquiry respecting the corruption of the sovereign power of a State. If the title be plainly deduced from a legislative act, which the legislature might constitutionally pass, if the act be clothed with all the requisite forms of a law, a court, sitting as a court of law, cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law.

The circuit court, therefore, did right in overruling this demurrer.

The 4th covenant in the deed is, that the title to the premises has been, in no way, constitutionally or legally impaired by virtue of any subsequent act of any subsequent legislature of the State of Georgia.

The third count recites the undue means practised on certain members of the legislature, as stated in the second count, and then alleges that, in consequence of these practices and of other causes, a subsequent legislature passed an act annulling and rescinding the law under which the conveyance to the original grantees was made, declaring that conveyance void, and asserting the title of the State to the lands it contained. The *count proceeds to recite at [*132] large, this rescinding act, and concludes with averring that, by reason of this act, the title of the said Peck in the premises was constitutionally and legally impaired, and rendered null and void.

After protesting, as before, that no such promises were made as stated in this count, the defendant again pleads that himself and the first purchaser under the original grantees, and all intermediate holders of the property, were purchasers without notice.

To this plea there is a demurrer and joinder.

The importance and the difficulty of the questions presented by these pleadings, are deeply felt by the court.

The lands in controversy vested absolutely in James Gunn and

others, the original grantees, by the conveyance of the governor, made in pursuance of an act of assembly to which the legislature was fully competent. Being thus in full possession of the legal estate, they, for a valuable consideration, conveyed portions of the land to those who were willing to purchase. If the original transaction was infected with fraud, these purchasers did not participate in it, and had no notice of it. They were innocent. Yet the legislature of Georgia has involved them in the fate of the first parties to the transaction, and, if the act be valid, has annihilated their rights also.

The legislature of Georgia was a party to this transaction; and for a party to pronounce its own deed invalid, whatever cause may be assigned for its invalidity, must be considered as a mere act of power which must find its vindication in a train of reasoning not often heard in courts of justice.

But the real party, it is said, are the people, and when their agents are unfaithful, the acts of those agents cease to be obligatory.

[*133] It is, however, to be recollected that the people can *act only by these agents, and that, while within the powers conferred on them, their acts must must be considered as the acts of the people. If the agents be corrupt, others may be chosen, and if their contracts be examinable, the common sentiment, as well as common usage of mankind, points out a mode by which this examination may be made, and their validity determined.

If the legislature of Georgia was not bound to submit its pretensions to those tribunals which are established for the security of property, and to decide on human rights, if it might claim to itself the power of judging in its own case, yet there are certain great principles of justice, whose authority is universally acknowledged, that ought not to be entirely disregarded.

If the legislature be its own judge in its own case, it would seem equitable that its decision should be regulated by those rules which would have regulated the decision of a judicial tribunal. The question was, in its nature, a question of title, and the tribunal which decided it was either acting in the character of a court of justice, and performing a duty usually assigned to a court, or it was exerting a mere act of power in which it was controlled only by its own will.

If a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside, as between the parties; but the rights of third persons, who are purchasers without notice, for a valuable consideration, cannot be disregarded. Titles, which, according to every legal test, are perfect, are acquired with that confidence which is inspired by the opinion that the purchaser is safe. If there be any concealed defect, arising from

the conduct of those who had held the property long before he acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the *intercourse between man [*134] and man would be very seriously obstructed, if this principle be overturned.

A court of chancery, therefore, had a bill been brought to set aside the conveyance made to James Gunn and others, as being obtained by improper practices with the legislature, whatever might have been its decision as respected the original grantees, would have been bound, by its own rules, and by the clearest principles of equity, to leave unmolested those who were purchasers, without notice, for a valuable consideration.

If the legislature felt itself absolved from those rules of property which are common to all the citizens of the United States, and from those principles of equity which are acknowledged in all our courts, its act is to be supported by its power alone, and the same power may devest any other individual of his lands, if it shall be the will of the legislature so to exert it.

It is not intended to speak with disrespect of the legislature of Georgia, or of its acts. Far from it. The question is a general question, and is treated as one. For although such powerful objections to a legislative grant, as are alleged against this, may not again exist, yet the principle, on which alone this rescinding act is to be supported, may be applied to every case to which it shall be the will of any legislature to apply it. The principle is this: that a legislature may, by its own act, devest the vested estate of any man whatever, for reasons which shall, by itself, be deemed sufficient.

In this case the legislature may have had ample proof that the original grant was obtained by practices which can never be too much reprobated, and which would have justified its abrogation so far as respected those to whom crime was imputable. But the grant, when issued, conveyed an estate in fee-simple to the grantee, clothed with all the solemnities which law can bestow. This estate was transferable; and those who purchased parts of it were not stained by that *guilt which infected the original transaction. [*135] Their case is not distinguishable from the ordinary case of purchasers of a legal estate without knowledge of any secret fraud which might have led to the emanation of the original grant. According to the well-known course of equity, their rights could not be affected by such fraud. Their situation was the same, their title

was the same, with that of every other member of the community who holds land by regular conveyances from the original patentee.

Is the power of the legislature competent to the annihilation of such title, and to a resumption of the property thus held?

The principle asserted is, that one legislature is competent to repeal any act which a former legislature was competent to pass; and that one legislature cannot abridge the powers of a succeeding legislature.

The correctness of this principle, so far as respects general legislation, can never be controverted. But if an act be done under a law, a succeeding legislature cannot undo it. The past cannot be recalled by the most absolute power. Conveyances have been made, those conveyances have vested legal estates, and, if those estates may be seized by the sovereign authority, still, that they originally vested is a fact, and cannot cease to be a fact.

When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot devest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community.

It may well be doubted whether the nature of society and of government does not prescribe some limits to the legislative power; and if any be prescribed, where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation.

[*136] *To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public, be in the nature of the legislative power, is well worthy of serious reflection.

It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments. How far the power of giving the law may involve every other power, in cases where the constitution is silent, never has been, and perhaps never can be, definitely stated.

The validity of this rescinding act, then, might well be doubted, were Georgia a single sovereign power. But Georgia cannot be viewed as a single, unconnected, sovereign power, on whose legislature no other restrictions are imposed than may be found in its own constitution. She is a part of a large empire; she is a member of the American Union; and that union has a constitution the supremacy of which all acknowledge, and which imposes limits to the legislatures of the several States, which none claim a right to pass. The

constitution of the United States declares that no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

Does the case now under consideration come within this prohibitory section of the constitution?

In considering this very interesting question, we immediately ask ourselves what is a contract? Is a grant a contract?

A contract is a compact between two or more parties, and is either executory or executed. An executory contract is one in which a party binds himself to do, or not to do, a particular thing; such was the law under which the conveyance was made by the governor. A contract executed is one in which the object of [*137] contract is performed; and this, says Blackstone, differs in nothing from a grant. The contract between Georgia and the purchasers was executed by the grant. A contract executed, as well as one which is executory, contains obligations binding on the parties. A grant, in its own nature, amounts to an extinguishment of the right of the grantor, and implies a contract not to reassert that right. A party is, therefore, always estopped by his own grant.

Since, then, in fact, a grant is a contract executed, the obligation of which still continues, and since the constitution uses the general term contract, without distinguishing between those which are executory and those which are executed, it must be construed to comprehend the latter as well as the former. A law annulling conveyances between individuals, and declaring that the grantors should stand seized of their former estates, notwithstanding those grants, would be as repugnant to the constitution as a law discharging the vendors of property from the obligation of executing their contracts by conveyances. It would be strange if a contract to convey was secured by the constitution, while an absolute conveyance remained unprotected.

If, under a fair construction of the constitution, grants are comprehended under the term contracts, is a grant from the State excluded from the operation of the provision? Is the clause to be considered as inhibiting the State from impairing the obligation of contracts between two individuals, but as excluding from that inhibition contracts made with itself?

The words themselves contain no such distinction. They are general, and are applicable to contracts of every description. If contracts made with the State are to be exempted from their operation, the exception must arise from the character of the contracting party, not from the words which are employed.

Whatever respect might have been felt for the state sovereignties, it is not to be disguised that the framers of the constitution

[*138] viewed, with some apprehension, *the violent acts which might grow out of the feelings of the moment; and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. The restrictions on the legislative power of the States are obviously founded in this sentiment; and the Constitution of the United States contains what may be deemed a bill of rights for the people of each State.

No State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.

A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both.

In this form the power of the legislature over the lives and fortunes of individuals is expressly restrained. What motive, then, for implying, in words which import a general prohibition to impair the obligation of contracts, an exception in favor of the right to impair the obligation of those contracts into which the State may enter?

The State legislatures can pass no *ex post facto* law. An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when it was committed. Such a law may inflict penalties on the person, or may inflict pecuniary penalties which swell the public treasury. The legislature is then prohibited from passing a law by which a man's estate, or any part of it, shall be seized for a crime which was not declared, by some previous law, to render him liable to that punishment. Why, then, should violence be done to the natural meaning of words for the purpose of leaving to the legislature the power of seizing, for public use, the estate of an individual in the form of a law annulling the title by which he holds that estate? The court can perceive no sufficient grounds for making that distinction. This rescinding act would have the effect of an *ex post facto* law. It forfeits the estate of Fletcher for a crime not committed by himself, but by those from whom he pur-
[*139] chased. *This cannot be effected in the form of an *ex post facto* law, or bill of attainder; why, then, is it allowable in the form of a law annulling the original grant?

The argument in favor of presuming an intention to except a case, not excepted by the words of the constitution, is susceptible of some illustration from a principle originally ingrafted in that instrument, though no longer a part of it. The constitution, as passed, gave the courts of the United States jurisdiction in suits brought against individual States. A State, then, which violated its own contract, was suable in the courts of the United States for that violation. Would

it have been a defence in such a suit to say that the State had passed a law absolving itself from the contract? It is scarcely to be conceived that such a defence could be set up. And yet, if a State is neither restrained by the general principles of our political institutions, nor by the words of the constitution, from impairing the obligation of its own contracts, such a defence would be a valid one. This feature is no longer found in the constitution; but it aids in the construction of those clauses with which it was originally associated.

It is, then, the unanimous opinion of the court, that, in this case, the estate having passed into the hands of a purchaser for a valuable consideration, without notice, the State of Georgia was restrained, either by general principles which are common to our free institutions, or by the particular provisions of the Constitution of the United States, from passing a law whereby the estate of the plaintiff in the premises so purchased could be constitutionally and legally impaired and rendered null and void.

In overruling the demurrer to the 3d plea, therefore, there is no error.

The first covenant in the deed is, that the State of Georgia, at the time the act of the legislature thereof, entitled as aforesaid, was legally seized in fee of the soil thereof, subject only to the extinguishment of part of the Indian title thereon.

* The 4th count assigns, as a breach of this covenant, that [*140] the right to the soil was in the United States, and not in Georgia.

To this count the defendant pleads, that the State of Georgia was seized; and tenders an issue on the fact in which the plaintiff joins. On this issue a special verdict is found.

The jury find the grant of Carolina, by Charles II., to the Earl of Clarendon, and others, comprehending the whole country, from 36 deg. 30 min., north lat., to 29 deg. north lat., and from the Atlantic to the South Sea.

They find that the northern part of this territory was afterwards erected into a separate colony, and that the most northern part of the 35th deg. of north lat., was the boundary line between North and South Carolina.

That seven of the eight proprietors of the Carolinas, surrendered to George II., in the year 1729, who appointed a governor of South Carolina.

That in 1732, George II., granted to the Lord Viscount Percival, and others, seven eighths of the territory between the Savannah and the Alatamaha, and extending west to the South Sea, and that the remaining eighth part, which was still the property of the heir of

Lord Carteret, one of the original grantees of Carolina, was afterwards conveyed to them. This territory was constituted a colony, and called Georgia.

That the governor of South Carolina continued to exercise jurisdiction south of Georgia.

That, in 1752, the grantees surrendered to the crown.

That, in 1754, a governor was appointed by the crown, with a commission describing the boundaries of the colony.

That a treaty of peace was concluded between Great
[* 141] * Britain and Spain, in 1763, in which the latter ceded to the former Florida, with Fort St. Augustin, and the Bay of Pensacola.

That, in October, 1763, the king of Great Britain issued a proclamation, creating four new colonies, Quebec, East Florida, West Florida, and Grenada; and prescribing the bounds of each, and further declaring that all the lands between the Alatamaha, and St. Marys, should be annexed to Georgia. The same proclamation contained a clause reserving, under the dominion and protection of the crown, for the use of the Indians, all the lands on the western waters, and forbidding a settlement on them, or a purchase of them from the Indians. The lands conveyed to the plaintiff lie on the western waters.

That, in November, 1763, a commission was issued to the governor of Georgia, in which the boundaries of that province are described, as extending westward to the Mississippi. A commission, describing boundaries of the same extent, was afterwards granted in 1764.

That a war broke out between Great Britain and her colonies, which terminated in a treaty of peace, acknowledging them as sovereign and independent States.

That, in April, 1787, a convention was entered into between the States of South Carolina and Georgia, settling the boundary line between them.

The jury afterwards describe the situation of the lands mentioned in the plaintiff's declaration, in such manner that their lying within the limits of Georgia, as defined in the proclamation of 1763, in the treaty of peace, and in the convention between that State and South Carolina, has not been questioned.

The counsel for the plaintiff rest their argument on a single proposition. They contend that the reservation for the use of
[* 142] the Indians, contained in the proclamation * of 1763, excepts the lands on the western waters from the colonies within whose bounds they would otherwise have been, and that they were acquired by the revolutionary war. All acquisitions during the war,

it is contended, were made by the joint arms, for the joint benefit of the United States, and not for the benefit of any particular State.

The court does not understand the proclamation as it is understood by the counsel for the plaintiff. The reservation for the use of the Indians appears to be a temporary arrangement, suspending, for a time, the settlement of the country reserved, and the powers of the royal governor within the territory reserved, but is not conceived to amount to an alteration of the boundaries of the colony. If the language of the proclamation be, in itself, doubtful, the commissions subsequent thereto, which were given to the governors of Georgia, entirely remove the doubt.

The question, whether the vacant lands within the United States became a joint property, or belonged to the separate States, was a momentous question, which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

It is the opinion of the court, that the particular land stated in the declaration appears, from this special verdict, to lie within the State of Georgia, and that the State of Georgia had power to grant it.

Some difficulty was produced by the language of the covenant, and of the pleadings. It was doubted whether a State can be seized in fee of lands subject to the Indian title, and whether a decision that they were seized in fee might not be construed to amount to a decision that their grantee might maintain an ejectment for them, notwithstanding that title.

The majority of the court is of opinion that the nature of the Indian title, which is certainly to be respected * by all courts, until it be legitimately extinguished, is not such as to be absolutely repugnant to seizin in fee on the part of the State. [*143]

Judgment affirmed, with costs.

JOHNSON, J. In this case I entertain, on two points, an opinion different from that which has been delivered by the court.

I do not hesitate to declare that a State does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the Deity.

A contrary opinion can only be maintained upon the ground that no existing legislature can abridge the powers of those which will succeed it. To a certain extent this is certainly correct; but the dis

tinction lies between power and interest, the right of jurisdiction and the right of soil.

The right of jurisdiction is essentially connected to, or rather identified with, the national sovereignty. To part with it is to commit a species of political suicide. In fact a power to produce its own annihilation is an absurdity in terms. It is a power as utterly incommunicable to a political as to a natural person. But it is not so with with the interests or property of a nation. Its possessions nationally are in nowise necessary to its political existence; they are entirely accidental, and may be parted with in every respect similarly to those of the individuals who compose the community. When the legislature have once conveyed their interest or property in any subject to the individual, they have lost all control over it; have nothing to act upon; it has passed from them; is vested in the individual; becomes intimately blended with his existence, as essentially so as the blood that circulates through his system. The government may indeed demand of him the one or the other, not because they are not his, but because whatever is his is his country's.

[*144] *As to the idea, that the grants of a legislature may be void because the legislature are corrupt, it appears to me to be subject to insuperable difficulties. The acts of the supreme power of a country must be considered pure for the same reason that all sovereign acts must be considered just; because there is no power that can declare them otherwise. The absurdity in this case would have been strikingly perceived, could the party who passed the act of cession have got again into power, and declared themselves pure, and the intermediate legislature corrupt.

The security of a people against the misconduct of their rulers, must lie in the frequent recurrence to first principles, and the imposition of adequate constitutional restrictions. Nor would it be difficult, with the same view, for laws to be framed which would bring the conduct of individuals under the review of adequate tribunals, and make them suffer under the consequence of their own immoral conduct.

I have thrown out these ideas that I may have it distinctly understood that my opinion on this point is not founded on the provision in the Constitution of the United States, relative to laws impairing the obligation of contracts. It is much to be regretted that words of less equivocal signification had not been adopted in that article of the constitution. There is reason to believe, from the letters of Publius, which are well known to be entitled to the highest respect, that the object of the convention was to afford a general protection to individual rights against the acts of the State legislatures.

Whether the words, "acts impairing the obligation of contracts," can be construed to have the same force as must have been given to the words "obligation and effect of contracts," is the difficulty in my mind.

There can be no solid objection to adopting the technical definition of the word "contract," given by Blackstone. The etymology, the classical signification, and the civil law idea of the word, will all support it. But the difficulty arises on the word "obligation," *which certainly imports an existing moral or physical [*145] necessity. Now a grant or conveyance by no means necessarily implies the continuance of an obligation beyond the moment of executing it. It is most generally but the consummation of a contract, is *functus officio* the moment it is executed, and continues afterwards to be nothing more than the evidence that a certain act was done.

I enter with great hesitation upon this question, because it involves a subject of the greatest delicacy and much difficulty. The States and the United States are continually legislating on the subject of contracts, prescribing the mode of authentication, the time within which suits shall be prosecuted for them, in many cases affecting existing contracts by the laws which they pass, and declaring them to cease or lose their effect for want of compliance, in the parties, with such statutory provisions. All these acts appear to be within the most correct limits of legislative powers, and most beneficially exercised, and certainly could not have been intended to be affected by this constitutional provision; yet where to draw the line, or how to define or limit the words, "obligation of contracts," will be found a subject of extreme difficulty.

To give it the general effect of a restriction of the State powers in favor of private rights, is certainly going very far beyond the obvious and necessary import of the words, and would operate to restrict the States in the exercise of that right which every community must exercise, of possessing itself of the property of the individual, when necessary for public uses; a right which a magnanimous and just government will never exercise without amply indemnifying the individual, and which perhaps amounts to nothing more than a power to oblige him to sell and convey, when the public necessities require it.

The other point on which I dissent from the opinion of the court, is relative to the judgment which ought to be given on the first count. Upon that count we are *called upon substan- [*146] tially to decide, "that the State of Georgia, at the time of passing the act of cession, was legally seized in fee of the soil, (then

ceded,) subject only to the extinguishment of part of the Indian title." That is, that the State of Georgia was seized of an estate in fee-simple in the lands in question, subject to another estate, we know not what, nor whether it may not swallow up the whole estate decided to exist in Georgia. It would seem that the mere vagueness and uncertainty of this covenant would be a sufficient objection to deciding in favor of it, but to me it appears that the facts in the case are sufficient to support the opinion that the State of Georgia had not a fee-simple in the land in question.

This is a question of much delicacy, and more fitted for a diplomatic or legislative than a judicial inquiry. But I am called upon to make a decision, and I must make it upon technical principles.

The question is, whether it can be correctly predicated of the interest or estate which the State of Georgia had in these lands, "that the State was seized thereof, in fee-simple."

To me it appears that the interest of Georgia in that land amounted to nothing more than a mere possibility, and that her conveyance thereof could operate legally only as a covenant to convey or to stand seized to a use.

The correctness of this opinion will depend upon a just view of the state of the Indian nations. This will be found to be very various. Some have totally extinguished their national fire, and submitted themselves to the laws of the States; others have, by treaty, acknowledged that they hold their national existence at the will of the State within which they reside; others retain a limited sovereignty, and the absolute proprietorship of their soil. The latter is the case of the tribes to the west of Georgia. We legislate upon the conduct of strangers or citizens within their limits, but innumerable treaties formed with them * acknowledge them to be an independent people, and the uniform practice of acknowledging their right of soil, by purchasing from them, and restraining all persons from encroaching upon their territory, makes it unnecessary to insist upon their right of soil. Can, then, one nation be said to be seized of a fee-simple in lands, the right of soil of which is in another nation? It is awkward to apply the technical idea of a fee-simple to the interests of a nation, but I must consider an absolute right of soil as an estate to them and their heirs. A fee-simple interest may be held in reversion, but our law will not admit the idea of its being limited after a fee-simple. In fact, if the Indian nations be the absolute proprietors of their soil, no other nation can be said to have the same interest in it. What, then, practically, is the interest of the States in the soil of the Indians within their boundaries. Unaffected by particular treaties, it is nothing

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more than what was assumed at the first settlement of the country, to wit, a right of conquest or of purchase, exclusively of all competitors within certain defined limits. All the restrictions upon the right of soil in the Indians, amount only to an exclusion of all competitors from their markets; and the limitation upon their sovereignty amounts to the right of governing every person within their limits except themselves. If the interest in Georgia was nothing more than a preëmptive right, how could that be called a fee-simple, which was nothing more than a power to acquire a fee-simple by purchase, when the proprietors should be pleased to sell? And if this ever was any thing more than a mere possibility, it certainly was reduced to that state when the State of Georgia ceded, to the United States, by the constitution, both the power of preëmption and of conquest, retaining for itself only a resulting right dependent on a purchase or conquest to be made by the United States.

I have been very unwilling to proceed to the decision of this cause at all. It appears to me to bear strong evidence, upon the face of it, of being a mere feigned case. It is our duty to decide on the rights, but not on the speculations of parties. My *con- [*148] fidence, however, in the respectable gentlemen who have been engaged for the parties, has induced me to abandon my scruples, in the belief that they would never consent to impose a mere feigned case upon this court.

7 C. 164; 4 W. 518; 8 W. 1, 543; 12 W. 117, 213; 2 P. 380; 4 P. 514; 5 P. 1; 6 P. 691; 8 P. 88: 11 P. 420; 12 P. 410, 657; 13 P. 195; 6 H. 301; 7 H. 283; 9 H. 451; 10 H. 395; 16 H. 369; 17 H. 456; 18 H. 331; 19 H. 393.

Massie v. Watts.

6 C. 148.

In a case of fraud, trust, or contract, the jurisdiction of a court of equity is sustainable, wherever the person is found, though the decree may affect lands without its jurisdiction.

Under the land law of Virginia, if by any reasonable construction an entry is supportable, it will be supported.

When a given quantity of land is to be laid off on a given base, it is to be in a parallellogram, unless this form would be repugnant to the entry; and where necessarily departed from, the departure should extend no further than the calls render necessary.

An agent, to locate a warrant, who takes a title to himself, of land which he should have had surveyed for his principal, becomes a trustee for his principal.

This was an appeal from a decree of the circuit court of the United

States, for the district of Kentucky, in a suit in equity brought by Watts, a citizen of Virginia, against Massie, a citizen of Kentucky, to compel the latter to convey to the former 1,000 acres of land in the State of Ohio, the defendant having obtained the legal title with notice of the plaintiff's equitable title.

The material facts, so far as intelligible without a plat, are stated in the opinion of the court.

Pope, for the plaintiff.

P. B. Key, and *H. Clay*, for the defendant.

[*157] *MARSHALL, C. J., delivered the opinion of the court, as follows:

This suit having been originally instituted, in the court of Kentucky, for the purpose of obtaining a conveyance for lands lying in the State of Ohio, an objection is made by the plaintiff in [*158] error, who was the *defendant below, to the jurisdiction of the court by which the decree was rendered.

Taking into view the character of the suit in chancery brought to establish a prior title originating under the land law of Virginia against a person claiming under a senior patent, considering it as a substitute for a *caveat* introduced by the peculiar circumstances attending those titles, this court is of opinion, that there is much reason for considering it as a local action, and for confining it to the court sitting within the State in which the lands lie. Was this cause, therefore, to be considered as involving a naked question of title, was it, for example, a contest between Watts and Powell, the jurisdiction of the circuit court of Kentucky would not be sustained. But where the question changes its character, where the defendant in the original action is liable to the plaintiff, either in consequence of contract, or as trustee, or as the holder of a legal title acquired by any species of *mala fides* practised on the plaintiff, the principles of equity give a court jurisdiction wherever the person may be found, and the circumstance, that a question of title may be involved in the inquiry, and may even constitute the essential point on which the case depends, does not seem sufficient to arrest that jurisdiction.

In the celebrated case of Penn *v.* Lord Baltimore, 1 Vez. 444, the chancellor of England decreed a specific performance of a contract respecting lands lying in North America. The objection to the jurisdiction of the court, in that case, as reported by Vezey, was not that the lands lay without the jurisdiction of the court, but that, in cases relating to boundaries between provinces, the jurisdiction was exclu-

sively in the king and council. It is in reference to this objection, not to an objection that the lands were without his jurisdiction, that the chancellor says, "This court, therefore, has no original jurisdiction on the direct question of the original right of boundaries." The reason why it had no original jurisdiction on this direct question was, that the decision on the extent of those grants, including dominion and political power, as well as property, was [*159] exclusively reserved to the king in council.

In a subsequent part of the opinion, where he treats of the objection to the jurisdiction of the court, arising from its inability to enforce its decree *in rem*, he allows no weight to that argument. The strict primary decree of a court of equity is, he says, *in personam*, and may be enforced in all cases where the person is within its jurisdiction. In confirmation of this position he cites the practice of the courts to decree respecting lands lying in Ireland and in the colonies, if the person, against whom the decree was prayed, be found in England.

In the case of Arglasse *v.* Muschamp, 1 Vern. 75, the defendant, residing in England, having fraudulently obtained a rent-charge on lands lying in Ireland, a bill was brought in England to set it aside. To an objection made to the jurisdiction of the court the chancellor replied, "This is surely only a jest put upon the jurisdiction of this court by the common lawyers; for when you go about to bind the lands and grant a sequestration to execute a decree, then they readily tell you that the authority of this court is only to regulate a man's conscience, and ought not to affect the estate, but that this court must *agere in personam* only; and when, as in this case, you prosecute the person for a fraud, they tell you that you must not intermeddle here, because, the fraud, though committed here, concerns lands that lie in Ireland, which makes the jurisdiction local, and so wholly elude the jurisdiction of this court." The chancellor, in that case, sustained his jurisdiction on principle, and on the authority of Archer and Preston, in which case a contract made respecting lands in Ireland, the title to which depended on the act of settlement, was enforced in England, although the defendant was a resident of Ireland, and had only made a casual visit to England. On a rehearing before Lord Keeper North this decree was affirmed.

In the case of The Earl of Kildare *v.* Sir Morrice Eus- [*160] tace and Fitzgerald, 1 Vern. 419, it was determined, that if the trustee live in England, the chancellor may enforce the trust, although the lands lie in Ireland.

In the case of Toller *v.* Carteret, 2 Vern. 494, a bill was sustained for the foreclosure of a mortgage of lands lying out of the jurisdiction of the court, the person of the mortgagor being within it.

Subsequent to these decisions was the case of Penn against Lord Baltimore, 1 Vez. 444, in which the specific performance of a contract for lands lying in North America was decreed in England.

Upon the authority of these cases, and of others which are to be found in the books, as well as upon general principles, this court is of opinion that, in a case of fraud, of trust, or of contract, the jurisdiction of a court of chancery is sustainable wherever the person be found, although lands not within the jurisdiction of that court may be affected by the decree.

The inquiry, therefore, will be, whether this be an unmixed question of title, or a case of fraud, trust or contract.

The facts in this case, so far as they affect the question of jurisdiction, are, that, in 1787, the land warrant, of which Watts is now the proprietor, and which then belonged to Oneal, was placed without any special contract, in the hands of Massie, as a common locator of lands. In the month of August in the same year he located 1,000 acres, part of this warrant, to adjoin a previous location made on the same day for Robert Powell.

In the year 1793, Massie, as deputy-surveyor, surveyed the lands of Thomas Massie, on which Robert Powell's entry depended, and the land of Robert Powell, on which Oneal's entry, now the property of Watts, depended. On the 27th of June, 1795, Nathaniel Massie, the plaintiff in error, entered for himself 2,366 acres of land [*161] *to adjoin the surveys made for Robert Powell, Thomas Massie, and one Daniel Stull. The entry of Daniel Stull commences at the upper corner of Ferdinand Oneal's entry on the Scioto, and the entry of Ferdinand Oneal commences at the upper corner of Robert Powell's entry on the Scioto; so that the land of Oneal would be supposed, from the entries, to occupy the space on the Scioto between Powell and Stull. Nathaniel Massie's entry, which was made after surveying the lands of Thomas Massie and of Robert Powell, binds on the Scioto, and occupies the whole space between Powell's survey and Stull's survey.

In the year 1796, Nathaniel Massie surveyed 530 acres of Oneal's entry, chiefly within Stull's survey, and afterwards, in the spring of 1797, purchased Powell's survey. Nathaniel Massie's entry is surveyed and patented. In 1801 Massie received from Watts, in money, the customary compensation for making his location.

It is alleged that Nathaniel Massie has acquired for himself the land which was comprehended within Oneal's entry, and has surveyed for Oneal land to which his entry can by no construction be extended.

If this allegation be unsupported by evidence, there is an end of

the case. If it be supported, had the court of Kentucky jurisdiction of the cause?

Although no express contract be made, yet it cannot be doubted that the law implies a contract between every man who transacts business for another at the request of that other and the person for whom it is transacted. A common locator who undertakes to locate lands for an absent person is bound to perform the usual duties of a locator, and is entitled to the customary compensation for those duties. If he fails in the performance of those duties, he is liable to the action of the injured party, which may be instituted wherever his person is found. If his compensation be refused, he may sue therefor in any court within whose jurisdiction the person for whom the location was made *can be found. In either action the [*162] manner in which the service was performed is inevitably the subject of investigation, and the difficulty of making it cannot oust the court of its jurisdiction.

From the nature of the business, and the situation of the parties, the person for whom the location is made being generally a non-resident, and almost universally unacquainted with the country in which his land is placed, it is the duty of the locator not only to locate the lands, but to show them to the surveyor. He also necessarily possesses the power to amend or to change the location if he has sufficient reason to believe that it is for the interest of his employer so to do. So far as respects the location he is substituted in the place of the owner, and his acts done *bonâ fide* are the acts of the owner.

If, under these circumstances, a locator finding that the entry he has made cannot be surveyed, instead of withdrawing it or amending it so as to render it susceptible of being carried into execution, secures the adjoining land for himself, and shows other land to the surveyor which the location cannot be construed to comprehend, it appears to this court to be a breach of duty, which amounts to a violation of the implied contract, and subjects him to the action of the party injured.

If the location be sustainable, and the locator, instead of showing the land really covered by the entry, shows other land, and appropriates to himself the land actually entered, this appears to the court to be a species of *mala fides* which will, in equity, convert him into a trustee for the party originally entitled to the land.

In either case the jurisdiction of the court of the State in which the person is found, is sustainable.

If we reason by analogy from the distinction between actions local and transitory at common law, this action would follow the person, because it would *be founded on an implied con- [*163] tract, or on neglect of duty.

If we reason from those principles which are laid down in the books relative to the jurisdiction of courts of equity, the jurisdiction of the court of Kentucky is equally sustainable, because the defendant, if liable, is either liable under his contract, or as trustee.

The case, then, as presented to the court, gives it jurisdiction, and the testimony must be examined to ascertain how far the bill is supported.

The entry of Thomas Massie begins at the junction of Paint Creek with the Scioto, and runs up the Sioto 520 poles, when reduced to a straight line, thence off at right angles from the general course of the river, so far that a line parallel thereto will include the quantity.

Respecting this entry there is no controversy.

Robert Powell enters 1,000 acres of land, "beginning at the upper corner on the Scioto, of Major Thomas Massie's entry, No. 480, running up the river 520 poles, when reduced to a straight line, thence from the beginning with Massie's line, so far that a line parallel with the general course of the river shall include the quantity."

Then Ferdinand Oneal enters 1,000 acres of land, beginning at the upper corner on the Scioto, of Robert Powell's entry, No. 503, running up the river 520 poles, when reduced to a straight line, and from the beginning with Powell's line, so far that a line parallel with the general course of the river shall include the quantity.

As Oneal's entry depends on Powell's, it is necessary to ascertain the land taken by Powell, before that of Oneal can be accurately determined.

[*164] Had the general course of the Scioto continued * nearly the same, no difficulty would have been found in this case. The surveys might have conformed literally to all the calls of each entry, and each tract would have constituted nearly a rectangular figure with a base of 520 poles on the river, and a back line parallel to that base. But the unexpected bends of the Scioto have deranged the uniformity of this chain of locations, and produced questions of considerable intricacy respecting the ground which must be covered by them.

Thomas Massie's entry being of 1,400 acres, and Powell's of only 1,000 acres, with a base of the same length on the river, it probably was thought certain that Massie's upper line would extend beyond Powell's land, and that the line of Powell, which was to run parallel to the river, would intersect Massie's upper line. Powell's entry, therefore, calls to run from the river with Massie's line, so far that a line parallel to the general course of the river will include the quantity. Upon actual survey the course of the river is found to be such that a line parallel thereto, drawn from the end of Massie's line,

would not include 200 acres of land. Under these circumstances Powell must lose between 8 and 900 acres of land, if his entry cannot be so construed as to extend beyond the length of Massie's line.

From the peculiar situation of titles acquired under the land law of Virginia, a law which offered for sale an immense unexplored wilderness, covered with savages equally fierce and hostile, leaving to the purchaser the right to place his warrant, which was the evidence of his purchase, on any land not previously appropriated, and requiring him to make his entries so certainly that any other person might locate the adjacent residuum, it followed inevitably that immense difficulties would occur, and that locations must often be lost, or receive that certainty which the law required from principles adapted to the general state of things in the country, but which were not precisely foreseen when the locations were made.

* These principles have been laid down by the courts, and [* 165] must be considered as expositions of the statute. A great proportion of the landed property of the country depends on adhering to them.

The great and equitable foundation on which they stand is this. If, by any reasonable construction of an entry, it can be supported, the courts will support it. This principle absolutely requires that all discretion, with respect to the mode of surveying an entry, should be surrendered. For if a location might be surveyed in various ways, then it is vague, and no subsequent locator would know how to enter the adjacent residuum. The court, therefore, is compelled to say in what manner every location, which appears, in its terms, to reserve some power in the locator to vary its form, shall be surveyed.

In the exercise of this essential and necessary power, they have declared that when a given quantity of land is to be laid off on a given base, it shall be included within four lines, so that the lines proceeding from the base shall be at right angles with it, and the line opposite the base shall be parallel to it, unless this form be repugnant to the entry.

The consequence of this principle is, that if the calls of an entry do not fully describe the land, but furnish enough to enable the court to complete the location by the application of certain principles, they will complete it.

They have also decided that, if a location have certain material calls sufficient to support it, and to describe the land, other calls less material and incompatible with the essential calls of the entry, may be discarded.

These principles, it is believed, will enable the court to ascertain, in a reasonable manner, the land covered by Powell's location.

[*166] The beginning is the upper corner of Massie on the * Scioto. A base line upon the river is then given to consist of 520 poles, when reduced to a straight line. Massie's upper line, to its whole extent, if necessary, is also given, and a back line parallel to the base is given. The side line opposite Massie's line, and the course from the termination of Massie's line to the back line are wanting, and are to be supplied by construction.

The material inquiry, so far as respects the present cause, is, in what direction shall Powell's upper line, extending back from the river to the line parallel to the general course of the river, be run? That line is not given, and is, consequently, to be supplied by construction.

According to the uniform course of decisions, Powell's upper line must project from the base of right angles with it, unless there shall be some other call in the entry which controls this general principle. It is contended that it is controlled by the call to run with Massie's line from the beginning. Massie's line not being at right angles with the base line, it is argued that Powell's opposite line, discarding the rectangular principle, must be parallel to the line from the beginning.

But the court does not concur with the counsel for the plaintiff in error, in this opinion. The principle, that the rectangular figure is to be preferred to any other, and is to be preserved whenever it can be preserved, originates in the necessity of adopting some regular figure in order to give to locations that certainty which is not always to be found in their terms, and in the superior convenience of that figure over every other, with respect to the adjacent residuum. These motives apply to a part as well as to the whole of an entry. If one location be made upon another, so that the lines of that other bind the entry on one side, and then a precise line be called for from the beginning to run a certain distance, from the end of which a line is to be drawn, and to continue until a line, parallel to the first [*167] or base line, or to some given point in * the lines of the person on whom the location is made, shall include the quantity, the same respect for certainty and convenience which induced originally the adoption of the rectangular figure would seem to require its adoption with respect to those lines which did not receive a different direction from the positive calls of the location. On one side there might be several different lines; but this would not seem to demand that, on the opposite side, the same variety should be preserved. It would be departing from the principle unnecessarily to require that the lines of the opposite side of the tract should be multplied in order to be all parallel to the lines by which one side was unavoidably bounded. To the court it seems that the rectangular

principle is always to be preserved, where it can be preserved, that is, where there is no call in the entry applying to the lines which control them, and that, where it is necessarily departed from, the departure should not be extended further than the necessity requires.

In this particular case the location does not call for a line parallel to Massie's line, and, as Massie's line was to run at right angles from the general course of the river, and it was obviously expected Powell's line would not extend the whole length of Massie's line, it is clear that the locator expected that Powell's upper line, when at right angles with the course of the river, would be nearly parallel to Massie's line.

This may be considered as, in some degree, an auxiliary argument in favor of the opinion which is entertained by this court, that the circuit court did right in laying down the upper line of Powell at right angles with his base line.

This line being established, it is of little importance to Oneal's claim in what manner the remaining lines of Powell may be run.

The call of the location, so far as respects the side binding on Massie, is said to stop at Massie's north-western corner. Is that line to be continued?

*The conclusive objection to it is, that it would intersect [*168] the upper line before the quantity was obtained, and would, consequently, entirely defeat the call for a back line parallel to the course of the river.

Is a line at right angles with the general course of the river to be run from Massie's corner and continued until a line parallel to the base line would include the quantity?

This would be less exceptionable, but it would be departing further from the square, and might, in some instances, exhibit a plat the breadth of which would not be one third of its length. This point, however, is not critically examined, because it is of very little importance in the present cause. The upper line of Powell, on which Oneal binds, would be the same as far as it now runs, and should it be continued further, it would only take a small angle of Oneal's survey as made by order of the circuit court.

The court is of opinion that Powell's entry is rightly surveyed by order of the circuit court, and it is an additional argument in support of this opinion, that, with the exception of the angle unavoidably made by the interference of Massie, the general form of the land approaches a square more nearly than if laid off in any other manner.

If Powell's entry be correctly surveyed, Oneal's cannot be laid off otherwise than it is.

Were it even to be admitted that the original survey made for

Powell was correct, it is entirely possible that the case of the plaintiff would not be materially improved thereby.

Powell's back line would probably terminate on the river; in which event, that would be his upper corner on the Scioto, which is called for as the beginning of Oneal's entry. Oneal then calls to run on the river a distance of 520 poles on a straight line, and with Powell's line so far as that a line parallel to the general course
[*169] *of the river shall include 1,000 acres. Either this entry is rendered totally incapable of being surveyed in consequence of the call for Powell's line, or it must be so surveyed as to include almost the whole town of Chilicothe, and to take a considerable part of Massie's land.

It is, however, unnecessary to inquire what would be the rights of the person claiming Oneal's entry, in that event, since the court is satisfied that the survey, as directed by the circuit court, is correct.

The case, then, as made out in evidence, is this: Nathaniel Massie, employed to locate a military warrant for Oneal, has entered the warrant in pursuance of his engagement. On surveying the entries on which that of Oneal depended, he either believed that Oneal's entry was void from the repugnancy of its calls, or if not absolutely void, was incapable of covering the land which, according to legal construction, and the common understanding of those who might read the entries, it must be considered as covering; or he thought that, by obtaining a prior patent for the land, he might resist any claim which might afterwards be made by Oneal, or those claiming under him. If Massie really believed that Powell's entry was properly surveyed, and that Oneal's entry, as made, could not be surveyed, it was his duty to amend it, or, if that was not his duty, to place it elsewhere. For omitting so to do he is chargeable with such gross neglect of duty as to render him responsible in damages, had his construction of Oneal's location even been correct. But, if in this he was mistaken, it would be dangerous in the extreme, it would be a cover for fraud which could seldom be removed, if a locator, alleging difficulties respecting a location, might withdraw it and take the land for himself. He, however, has not withdrawn it, except so far as it may be impliedly withdrawn by the survey of 530 acres. With that exception, the entry still covers the land on which it was originally placed, and is still entitled to that land. But Massie, the agent of Oneal, has entered and surveyed a portion of that land for himself, and obtained a patent for it in his own name.
[*170] *According to the clearest and best established principles of equity, the agent who so acts becomes a trustee for his prin-

cipal. He cannot hold the land under an entry for himself otherwise than as trustee for his principal.

So far, then, as Oneal's land is within Massie's survey, Massie is a trustee for Oneal and his assignees, and upon the principle stated in the early part of this opinion, the court of Kentucky had jurisdiction of the cause.

But a part of Oneal's land is surveyed for Powell, and in a contest between his assignees and Powell, the court of Kentucky would have had no jurisdiction. This controversy, however, is not with Powell; it is with Massie, who is the purchaser of Powell's rights. The whole property being thus in the hands of Massie, and the court of Kentucky being in possession of the cause, and having clear jurisdiction of a part of it which decides the principle on which the whole depends, that court did right in deciding the whole cause, and decreeing to the assignees of Oneal the whole land originally included in the entry made for him.

Considerable doubts were entertained respecting the right of Watts to more than the unsurveyed part of the entry. But a majority of the court is of opinion that he stands precisely in the place of Oneal.

As Massie does not show that he had conveyed any of that part of Powell's survey which is included within Oneal's entry previous to the institution of this suit, or even now, the allegation that he has conveyed a part of Powell's survey could not furnish sufficient matter for preventing the decree which was rendered.

The decree of the circuit court is affirmed, with costs.

6 W; 550; 5 P. 1; 6 P. 291, 389; 15 H. 233.

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*The United States v. Hall and Worth. [*171]

6 C. 171.

An embargo bond, conditioned to land a cargo at some port in the United States, "dangers of the seas excepted," is not forfeited, if the vessel be forced by stress of weather to put away for a foreign port, and the cargo is there landed by an order of the local government.

An effect, which is an inevitable consequence of a peril of the sea, must be ascribed to that as its cause.

Error to the circuit court of the United States for the district of Pennsylvania, in an action of debt. The nature of the case, and its material facts, appear in the opinion of the court.

Rodney, attorney-general, and *Jones*, for the United States.

Hopkinson, for the defendant.

[*174] *MARSHALL, C. J., delivered the opinion of the court, as follows:

[*175] This suit was instituted on a bond taken in *pursuance of the original Embargo Act,[1] with a condition that the cargo of the schooner Mary, a sea-letter vessel, should be relanded in the port of East Portland, or some other port of the United States, "the dangers of the seas only excepted."

Her cargo was not relanded within the United States, but was carried to Porto Rico and sold. The defendants allege that they were driven by stress of weather into Porto Rico, where the cargo was landed by order of the government; and they insist that the case is within the exception contained in the condition of the bond. The circuit court instructed the jury, that if they believed the testimony, it was sufficient in law, to bar the action. To this opinion the counsel for the United States excepted; and its propriety is now to be considered.

The improbability of the allegations made by the defendants is no longer the subject of inquiry. The jury have verified them, and the court must receive them as true. The testimony is, that The Mary was driven by tempestuous weather into a foreign port. That, while prosecuting her voyage, she encountered weather which so disabled both the crew and vessel, and put her in such a situation that, to escape Nantucket Shoals, "she was obliged to change her course, and endeavor to gain a southern port." She changed her course and bore for Charleston. But such was the condition of the crew and of the vessel, and so severe and so adverse were the winds, that she "could not make Charleston, nor any other port of the United States, and was obliged to bear away for the West Indies, to obtain relief."

The vessel, then, was driven into Porto Rico by the cause which forms the exception in the condition of the bond, and if the cargo had been lost at the mouth of the harbor, instead of entering the port, all would admit that the penalty of the bond had not been incurred. But it is contended that the dangers of the seas terminated on entering the port, and that no sufficient cause is shown for not bringing back the cargo to the United States.

[*176] *The case states that the governor of Porto Rico issued

[1] 2 Stats. at Large, 451.

an order that the cargo should be landed and sold, "with which order the captain was obliged to comply."

As this case is stated, The Mary was driven into Porto Rico, and the sale of her cargo, while there, was inevitable. The dangers of the sea placed her in a situation which put it out of the power of the owners to reland her cargo within the United States. The obligors, then, were prevented, by the dangers of the seas, from complying with the condition of the bond; for an effect, which proceeds inevitably, and of absolute necessity, from a specified cause, must be ascribed to that cause.

It is the unanimous opinion of this court that there is no error in the proceedings of the circuit court, and that the judgment be affirmed.

6 C. 307; 5 P. 109.

CAMPBELL *v.* GORDON and Wife.

6 C. 176.

Under the Naturalization Act of January 29, 1795, (1 Stats. at Large, 414,) the administration of the oath of allegiance amounts to a judgment of the court for the admission of the applicant to the rights of a citizen, and implies that all prerequisites had been complied with.

Under the act of April 14, 1802, (2 Stats. at Large, 153,) a minor child of a father so naturalized, became a citizen, though not then within the United States, provided she was resident therein at the time of the passage of the act.

THIS was an appeal from a decree of the circuit court of the United States for the district of Virginia, dismissing the bill of the complainant.

C. Lee and *F. S. Key*, for the appellant.

Swann, contrà.

WASHINGTON, J., delivered the opinion of the court as follows:

"The object of the bill was to rescind a contract made between the appellant and Robert Gordon, the appellee, for the sale of a tract of land by the latter to the former, upon the ground of a defect of title. The facts in the case, which are not disputed,

appear to be as follows: The land which forms the subject of dispute belonged to James Currie, a citizen of Virginia, who died seized thereof in fee, on the 23d of April, 1807, intestate, and without issue. James Currie had one brother of the whole blood, named William, who, prior to the 14th day of October, in the year 1795, was [*177] a subject of the king of Great Britain, but who * emigrated to the United States, and on the day last mentioned, at a district court held at Suffolk, in Virginia, took the oath prescribed by the act of congress, for entitling himself to the rights and privileges of a citizen. At the time when this oath was taken, William Currie had one daughter, Janetta, the wife of the appellee, who was born in Scotland. She came to the United States in October, 1797, whilst an infant, during the life of her father, and hath ever since continued to reside in the State of Virginia. William Currie died prior to the 23d of April, 1807."

[*181] *The title of the appellees to the land in question being disputed only upon the ground of the alienage of the female appellee, the court take it for granted that there is no other objection to its validity. It is contended, by the counsel for the appellant, that Janetta, who claims as heir to James Currie, is an alien, inasmuch as she has, by no act of her own, entitled herself to the rights and privileges of a citizen, and cannot claim those rights in virtue of her migration to the United States, and of any acts performed by her father. First, because her father was not duly naturalized; and secondly, because, if he were, she was not, at the time of her father's naturalization, dwelling within the United States.

[*182] *In support of the first objection it is contended that, although the oath prescribed by the second section of the act of congress entitled "An act to establish a uniform rule of naturalization, and to repeal the act heretofore passed on that subject," passed the 29th of January, 1795, was administered to the said William Currie, by a court of competent jurisdiction, still it does not appear, by the certificate granted to him by the court, and appearing in the record, that he was, by the judgment of the court, admitted a citizen, or that the court was satisfied that, during the term of two years, mentioned in the same section, he had behaved as a man of good moral character, attached to the Constitution of the United States, and well disposed to the good order and happiness of the same.

It is true, that this requisite to his admission is not stated in the certificate; but it is the opinion of this court, that the court of Suffolk must have been satisfied as to the character of the applicant, or otherwise a certificate, that the oath prescribed by law had been taken, would not have been granted.

It is unnecessary to decide whether, in the order of time, this satisfaction, as to the character of the applicant, must be first given, or whether it may not be required after the oath is administered, and, if not then given, whether a certificate of naturalization may not be withheld. But if the oath be administered, and nothing appears to the contrary, it must be presumed that the court, before whom the oath was taken, was satisfied as to the character of the applicant. The oath, when taken, confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights. It is, therefore, the unanimous opinion of the court, that William Currie was duly naturalized.

The next question to be decided is, whether the naturalization of William Currie conferred upon his daughter the rights of a citizen, after her coming to, and residing within the United States, she having been * a resident in a foreign country at the time [*183] when her father was naturalized.

Whatever difficulty might exist as to the construction of the 3d section of the act of the 29th of January, 1795, in relation to this point, it is conceived that the rights of citizenship were clearly conferred upon the female appellee by the 4th section of the act of the 14th of April, 1802.

This act declares that the children of persons duly naturalized under any of the laws of the United States, being under the age of twenty-one years at the time of their parent's being so naturalized, shall, if dwelling in the United States, be considered as citizens of the United States. This is precisely the case of Mrs. Gordon. Her father was duly naturalized, at which time she was an infant; but she came to the United States before the year 1802, and was at the time when this law passed, dwelling within the United States.

It is therefore the unanimous opinion of the court, that at the time of the death of James Currie, Mrs. Gordon was entitled to all the right and privilege of a citizen; and therefore that there is no error in the decree of the circuit court for the district of Virginia, which is to be affirmed, with costs.

M'Knight v. Craig's Administrator.

6 C. 183.

In Virginia, if the defendant die after interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded.

In all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court.

ERROR to the circuit court for the District of Columbia in an action of debt upon a judgment and *devastavit*, brought by M'Knight against Craig, as executor of Mitchell.

After an office judgment by default against Craig, and a writ of inquiry awarded in November, 1807, at the rules, Craig died. At the July term, 1808, his death was suggested, and a *scire facias* awarded against I. G. Ladd, his administrator. At the July term,

[*184] *1809, (being the fourth term after the office judgment,) Ladd appeared by his attorney, and offered to plead a special plea of *plene administravit*, by himself, as administrator of Craig, to which the plaintiff objected, but the court overruled the objection, and admitted the plea to be filed.

The substance of the plea was, that Craig had made a deed of trust of certain real estate to secure Ladd for his indorsements for Craig at the bank, by which deed Craig covenanted to indemnify Ladd. That Ladd had indorsed the notes of Craig to the amount of $8,000, which were discounted at the bank, and continued the indorsements to the time of Craig's death. That the bank had recovered judgment against Ladd as indorser of some of those notes to the amount of $6,009, and that Ladd had paid other of the said notes to the amount of $3,174, to avoid being compelled by suit to pay the same. That the estate, mentioned in the deed of trust, having been sold, produced only $4,095, whereby the estate of Craig became indebted to Ladd in the sum of $5,138, and so much of the estate of Craig is liable to be retained by Ladd in satisfaction.

That Craig was bound to several other creditors by specialties in large sums, amounting to $10,000, and suits thereupon have been brought against Ladd, and are now pending; that he has in his hands personal estate of Craig to the amount of $960 only, which is liable to be retained by him in satisfaction of the damage he has sustained by his indorsements for Craig, by virtue of the covenant for his indemnification, and to pay the specialty creditors aforesaid.

To this plea the plaintiff replied the office judgment and writ of inquiry awarded against Craig in his lifetime in this suit; the subsequent death of Craig, and the *scire facias* against Ladd, as his administrator, returnable to November term, 1808.

The defendant rejoined, that Craig died on the —— day of ——, in the year 1807.

[*185] To this rejoinder the plaintiff demurred, and assigned as

cause of demurrer, that the rejoinder is no answer to the replication, and is a departure from the plea.

The court below being of opinion that the plea was good, and the replication bad, rendered judgment upon the demurrer for the defendant.

The plaintiff sued out his writ of error.

E. J. Lee, for the plaintiff in error.

Swann, contrà. [*186]

*February 19. MARSHALL, C. J., delivered the opinion [*187] of the court, to the following effect:

The act of Assembly of Virginia, is copied almost literally from the English statute of 8 and 9 W. III. c. 11. The case in 6 Mod. 142, and 1 Salk. 315, is a decision expressly upon that statute, and is precisely in point, that the defendant upon the *scire facias* can only plead what the intestate could have pleaded; and that it is not to be considered as a proceeding against the representative of the deceased, but a continuance of the original action.

The plea is such as could not have been pleaded in the original action, and is therefore bad.

The judgment must be reversed, and the cause remanded for the defendant to plead to the original action, if he should think proper.

To a question by *E. J. Lee*, the chief justice answered, that if the plaintiff in error should obtain a judgment in the court below, it will of course be with costs. So in all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court.

KENNEDY *v.* BRENT.

6 C. 187.

The marshal is bound to serve process as soon as he reasonably can.

The service of a chancery attachment prevents the garnishee from legally parting with money in his hands.

ERROR to the circuit court for the District of Columbia in an action on the case by Kennedy against Brent, marshal of the District

[*188] of *Columbia, for the neglect of his deputy in not serving a subpœna in chancery, commonly called a chancery attachment, in due time, whereby the plaintiff lost his debt.

The defendant pleaded not guilty, and a verdict, by consent, was rendered for the plaintiff, subject to the opinion of the court upon a case agreed, which stated that on the 13th of December, 1804, the plaintiff filed his bill in chancery against Johnston and Hampson in the common form of a bill for a chancery attachment in Virginia.

And that the clerk of the court, at the instance of the plain-
[*189] tiff, issued a process commonly *called a chancery attachment, being a subpœna in the common form, to answer a bill in chancery, upon which was the following indorsement, namely, "Memorandum. The object of the bill this day filed in this case is to stay the moneys and effects of the defendant, Johnston, in the hands of the defendant, Hampson, to satisfy a debt due from the defendant, Johnston, to the complainant.

(Signed) "G. Deneale."

That this process, shortly after it was issued, was put into the hands of W. Fox, one of the defendant's deputies, to be executed, and might have been served by him if he had endeavored to have served the same, but it so happened that he did not serve the same, and that it afterwards got into the hands of Lewis Summers, another of the defendant's deputies, who served the same on the 20th day of June, 1805, and made the following return thereupon: "I received this attachment shortly after it issued, and delivered it to W. Fox, D. M., to serve, who shortly after left the town of Alexandria, leaving in the marshal's office two bundles of process, one marked 'process served,' and the other 'process not served.' In the first bundle was this subpœna in chancery. On or about May or June last, I was informed it had not then been served. I then examined this process and found it without any indorsement, and took the earliest opportunity to inquire of Mr. Fox as to the service of the subpœna, who informed me he did not recollect having served it. I then, on the 20th of June, served the same on Bryan Hampson. The other defendant, Johnston, not found.

(Signed) "L. Summers, D. M."

Whereupon it was agreed, that the verdict should be subject to the opinion of the court upon the following questions:

"1. As the marshal, by his deputy, executed the process
[*190] on the 20th of June, 1805, before the day *appointed for the return thereof, and returned the same on the return day

thereof, whether he was in law bound to have served the same, if in his power so to do, at any time previous to the said 20th of June, 1805, unless he was specially required by the plaintiff to serve the same, notwithstanding he received the same as marshal on the day on which the said process was issued.

"2. Whether the indorsement on the said process of subpœna would, after service thereof, create any legal impediment to the payment of the money over to the said Johnston by the said Bryan Hampson, and would, in case of such payment after service, make the said Bryan Hampson personally liable for the amount so paid over.

"If the court should be of opinion that the said marshal was not bound to have served the said process, if in his power to do so at any time previous to the 20th of June, 1805, (unless he was specially required by the plaintiff to serve the same, notwithstanding he received the same as marshal on the day on which the said process issued,) then the judgment is to be rendered for the defendant.

"And if, under the circumstances mentioned in the second question, the court should be of opinion, that the said Bryan Hampson would not be personally liable for the amount so paid over, and that his not being personally liable would be sufficient to discharge the marshal from any liability in this case, then judgment is to be rendered for the defendant.

"But if both those questions are decided for the plaintiff, then judgment upon the verdict is to be rendered for him."

The court below was of opinion that the statement of the case was not full enough to justify a verdict for the plaintiff, and directed judgment to be entered up for the defendant; whereupon the plaintiff brought his writ of error.

Swann, for plaintiff in error. [*191]

E. J. Lee, contrà.

MARSHALL, C. J., delivered the opinion of the court, to the following effect:

The questions intended to be submitted to the court were, 1st. Whether the marshal was bound to serve this process as soon as he reasonably could; and, 2. *Whether the service of such process would have made Hampson liable in case he had paid over the money after such service. On these points the court has no doubt. But the case is imperfectly stated. It does not appear that the plaintiff has sustained any loss by the neglect of the officer to serve the process, and for this reason [*192]

The judgment is affirmed.

16 P. 291.

KORN and WISEMILLER v. THE MUTUAL ASSURANCE SOCIETY, against Fire on Buildings, of the State of Virginia.

6 C. 192.

The separation of Alexandria from Virginia did not affect existing contracts between individuals. The insurance upon buildings in Alexandria did not cease by the separation, although the company could only insure houses in Virginia. The obligation of the insured to contribute, does not cease in consequence of his forfeiture of his own insurance by his own neglect. All the members of the company are bound by the act of the majority. No member can devest himself of his obligations as such, but according to the rules of the society.

ERROR to the circuit court for the District of Columbia.

This was a motion in the court below, in the name of the principal agent of the Mutual Assurance Society, for judgment against Korn & Wisemiller, for $116, "being the amount due from them for a half quota under a declaration for insurance made to the society, with 6 per cent. interest thereon from the 1st day of June, 1805."

The court below gave judgment according to the motion, and the defendants brought their writ of error.

This society was incorporated by the legislature of Virginia, by an act passed on the 22d of December, 1794, entitled "An act for establishing a Mutual Assurance Society against fire on buildings in this State."

The principles of the society are declared to be, "That the citizens of this State may insure their buildings against the losses and damages occasioned accidentally by fire; and that the insured pay the losses and expenses, each his share, according to the sum insured."

[*193] *The act provides, that the rules and regulations which should be concluded upon by a majority of the subscribers at the first meeting, should be binding on all those who should insure their property in that society; and that a majority of the society might at any time alter and amend the rules and regulations as they should judge necessary. That certain premiums should be agreed upon, to be paid by the insured, to constitute a fund to pay losses. And that if that fund should not be sufficient, a "repartition" among the insured should be made, and each should pay, on demand of the cashier, his share, according to the sum insured and the rate of hazard. It also provides that the property insured should be bound for the payment, and for that purpose might be sold. That such quotas when called for should be advertised, and when any person should

neglect to pay his quota, his insurance should cease until it should be paid. If the property should be sold, the purchaser was to become a subscriber in lieu of the vendor. The subscribers might be compelled to pay the premiums, on request of the cashier, with 6 per cent. interest to the day of payment.

By a subsequent act, passed in December, 1795, it was enacted, "That the said subscribers, a majority of them in person or by deputation being present, or a majority of the sum subscribed, when any meeting shall be held, being there represented, shall have power and authority to proceed and act in all matters and things in the first recited act mentioned, in as full, absolute, and unlimited a manner as they might or could do if all and every of the said subscribers were actually present and attending at any such meeting."

By an act passed the 12th of January, 1799, it is enacted, "That the said mutual insurance society shall have full power to recover the whole, or any part of such premiums or quotas as are, or may hereafter become, due from any delinquent subscriber or member, under his subscription or declaration for insurance made to the said society, on motion of the cashier of the society before the court of the county, or the court of the district wherein such delinquent may reside, ten *days' notice of such motion being [*194] previously given; and such court shall have full jurisdiction to hear and determine such motion, and to cause their judgment to be enforced with costs by any legal executions; saving to any person, against whom a motion shall be made, the right of a trial by jury, if he shall desire it."

By an act passed the 27th of January, 1803, it is enacted, "That the said society may insure buildings in the county of Alexandria, provided congress shall pass a law subjecting those who declare for insurance in that society to the provisions and regulations of the laws of Virginia, which are already, or may hereafter be, passed concerning the said society. The act to commence and be in force as soon as congress shall pass a law subjecting the citizens of the county of Alexandria, who shall hereafter subscribe for insurance in the said society, to the same mode of recovery in the court of the county of Alexandria as is now allowed and granted by the laws of this commonwealth against defaulting subscribers residing within this State."

On the 3d of March, 1803, congress passed such an act[1] as was contemplated by the legislature of Virginia.

On the 29th of January, 1805, Virginia passed an act, the preamble to which recites, that it had been represented on the part of the society that such a change in their constitution as would separate

[1] 2 Stats. at Large, 227.

the interests of the inhabitants of the towns from the interests of the inhabitants of the country, is essential to the "equalization" of the risks, and that the same had been agreed upon at a general annual meeting of the society. It therefore enacts, that the funds should be divided between the towns and the country, in proportion to the capital subscribed by the towns and country respectively, and, that the town funds should be only liable for town losses, and country funds for country losses. That during the year 1805, all the valuations of houses insured should be revised, and no loss paid but according to such revaluation, subject to a deduction of one fifth thereof; "and where such revaluation shall exceed the former valuation, an additional premium shall be paid."

[* 195] *That "it shall be lawful for any member of this society to withdraw from the same, on giving six weeks' previous notice, and upon paying all arrearages due at the time of withdrawing."

"That all debts due, or to become due, to the society may be sued for, prosecuted, and recovered in the name of the society in the same manner, in the same courts, and upon the same principles, as they may now be sued for, &c., except that the name of the cashier need not be used. That the agents, &c., shall perform the duties required from agents by the 19th article of the rules and regulations now in force."

By the 19th article of the rules and regulations of the society adopted and in force prior to the 29th of January, 1805, the duties of an agent were "to act for the society agreeably to the constitution, to apply to the houseowners of their respective counties, explain the plan to them, make out the declarations of insurance, procure the certificate of the majority of three respectable houseowners (of whom the county agent may be one,) of the valuation of the buildings, transmit the declarations, properly executed, to the principal agent, and correspond with him on what may be necessary to be done."

The plaintiffs in error made their declaration for insurance in the usual form under seal, and thereby promised that they would "abide by, observe, and adhere to the constitution, rules, and regulations which were already established, or might thereafter be established, by a majority of the assured present in person, or by representatives, or by a majority of the property insured, represented either by the persons themselves, or their proxy, duly authorized, or their deputy, as established by law, at any general meeting to be holden by the assurance society, or which were, or thereafter might be, established by the president and directors of the society."

In consequence of this declaration, the plaintiffs in error [* 196] paid the original premium of insurance and *obtained a

policy. The society demanded a half quota; "that is to say, for the payment as it existed on the 25th of February, 1805, of a sum equal to one half of the original premium, which half quota was required to be paid on the 1st of April, 1805, and is the sum for which judgment is now claimed."

By the 14th article of the original rules and regulations of the society, it is provided, that, "In every period of seven years from the commencement of this institution, there shall be new declarations and valuations for insurance upon buildings insured by this society, and whoever fails to renew his declarations and valuations for the space of three months from the expiration of each term of seven years, shall cease to enjoy the benefits of his assurance till such new declarations are made; should the valuation be less than before, the assured shall have no right to demand of the society the difference of the premiums, but it shall remain for the benefit of the society, and in case of any loss the insured are always to be paid according to the last valuation."

Korn & Wisemiller did not, within three months after the expiration of the first term of seven years, renew their declaration and valuation, and thereby ceased to enjoy the benefit of their insurance.

The town and county of Alexandria, in which these buildings were situated was, until the 27th of February, 1801, a part of the State of Virginia, since which day they have constituted a part of the District of Columbia. The plaintiffs have always been inhabitants of the town of Alexandria ever since the year 1789.

On the 25th of December, 1795, the society commenced the operations of the institution.

In pursuance of the act of Virginia of the 29th of January, 1805, a separation of the interests of the inhabitants of the towns from the interests of the inhabitants of the country, has been made in the manner expressed in the 1st, 2d, 3d, 4th, 5th and 6th sections.

*The new constitution in that act contained, went into [*197] operation on the 30th of January, 1805.

The plaintiffs in error made a declaration of revaluation of the property insured by them, which declaration was under their seals, and was produced and made in consequence of the representations of the agent of the society, who stated that the plaintiffs in error, were bound by their former declaration, and by the rules and regulations of the society, so to do.

C. Lee, for the plaintiffs in error.

Swann, contrà. [*198]

JOHNSON, J., delivered the opinion of the court, as follows:

This cause comes up from the circuit court of Alexan-
[*199] dria, *in which a summary judgment has been given for the recovery for a contribution demanded of the members of the mutual assurance society conformably to its by-laws.

The plaintiffs here contest their liability upon several grounds.

1. Because, by the separation of Alexandria from the State of Virginia, they virtually ceased to be members of the institution.

2. That by having omitted to revalue within seven years, they were no longer insured, and, of consequence, not liable to contribute.

3. That, by the alteration of the charter in 1805, their security and liability became so materially changed, as to discharge them from their contract.

4. That their revaluation in 1805 ought not to be obligatory upon them, because they were deluded into it by false or incorrect suggestions.

5. That they are not liable, under the description of persons who had insured prior to 1804, as they ought to be considered only as having insured at the time of their revaluation.

On the first of these points, the court are of opinion, that the separation of Alexandria from the State of Virginia could have no effect upon existing contracts of individuals. Such divisions of territory are entirely political; a separation of jurisdiction takes place, but private interests and private contracts remain unaffected, and every individual relation continues the same, except that of being associated under the same government. The circumstance, that the law of Virginia has limited the company to the bounds of the State, in performing its functions, could only prevent them from making new contracts subsequent to the separation, and until they had
[*200] received additional powers, *but could not release them from their liability to individuals with whom they had previously contracted. Nor can the circumstance of the members of the legislature being authorized to represent their respective counties, affect the case; for, although the Alexandria property could no longer be represented in that mode, there was nothing to prevent their appearing in person, or by proxy, at the meetings of the company.

The court are further of opinion, that all the other grounds assumed by the plaintiffs are equally untenable. Although, at the first view, it would appear reasonable that he who is not insured is not bound to contribute, yet there may exist strong reasons why, under the peculiar organization of this company, a different rule should be adopted; and certain it is that the individual may, by his own act,

subject himself to such a state of things. The liability of the members of this institution is of a twofold nature. It results both from an obligation to conform to the laws of their own making, as members of the body politic, and from a particular assumption or declaration which every individual signs on becoming a member. The latter is remarkably comprehensive. "We will abide by, observe, and adhere to the constitution, rules, and regulations which are already established, or may hereafter be established, by a majority of the insured present in person, or by representatives, or by the majority of the property insured, represented either by the persons themselves, or their proxy, duly authorized, or their deputy, as established by law, at any general meeting to be held by the said assurance society, or which are, or may hereafter be, established by the president and directors of the society." It would be difficult to find words of more extensive signification than these, or better calculated to aid, explain, and enforce the general principle, that the majority of a corporate body must have power to bind its individuals. It is true that the words of this declaration, as well as the general power of a corporate body, must be restricted by the nature and object of its institution; but apply this rule to the case before us, and it cannot avail the plaintiffs, for both the rule which suspends the security and the alteration made in its constitution, under a vote [*201] of the majority, are strictly conformable to the general objects for which the company was instituted.

We are of opinion that whilst Korn & Wisemiller continued members of the society, they remain subject to the general liability which that state imposes: and that, after becoming members, their ceasing to be so must be determined by the rules of the society, which rules, as far as we are at present advised, admit of only two cases; one is, where the house insured is consumed by fire, and the other, upon giving the notice, and conforming to the other regulations imposed by the by-laws.

It is observable that the rule which imposes the necessity of a septennial valuation of the property insured, does not contemplate a total rescission or annihilation of the contract; on the contrary, it is express in declaring that, upon a revaluation being made, the party shall continue insured by virtue of his former policy. We, therefore, consider this suspension of his security merely as a penalty imposed upon the member for neglecting to conform to a rule of the society. And it is certainly much more reasonable that he should be subject to a loss or inconvenience for his own neglect, than that he should be released from his liability to the society, in consequence of it.

As to what is contended to be a material alteration in their char-

ter, we consider it merely as a new arrangement or distribution of their funds; and whether just or unjust, reasonable or unreasonable, beneficial or otherwise, to all concerned, was certainly a mere matter of speculation, proper for the consideration of the society, and which no individual is at liberty to complain of, as he is bound to consider it as his own individual act. Every member, in fact, stands in the peculiar situation of being party of both sides, insurer and insured. Certainly the general submission which they have signed will cover their liability to submit to this alteration.

[*202] *The view which we have taken of this subject affords an answer to the fifth ground, and, in a great measure, to the fourth.

We consider the insured, upon every revaluation, as in under his former right of membership, and, of consequence, that the plaintiffs come under the description of persons who had insured before 1804; and, for the same reason, the representation of Scot (could any effect at all be given to the circumstances to which he testifies) was true, as to the membership of the plaintiffs, and as to their liability in that capacity. They must have known it was a question of law, on which Scot possessed no power to commit the society, and on which the plaintiffs themselves ought to have been as well informed as any other individual.

Judgment affirmed.

Atkinson v. The Mutual Assurance Society, against Fire on Buildings, of the State of Virginia.

6 C. 202.

The additional premium upon a revaluation under the rules of the society, is only upon the excess.

This case differed from the case of Korn & Wisemiller v. The Mutual Assurance Society; that being for a half quota, and this for the additional premium upon a revaluation, under the 7th section of the act of 1805. (See Virginia Laws, v. 2, App. 81.)

The question (which was submitted without argument) was, whether the additional premium should be charged on the whole sum at which the buildings were revalued, or only on the excess between the old and new valuation.

JOHNSON, J. The court is of opinion that the rule on the subject of premium imposes the additional premium only on the excess of the revaluation beyond the former valuation.

Judgment reversed.

7 C. 396.

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*THE UNITED STATES *v.* Ship HELEN. [*203]

6 C. 203.

A vessel having violated a law of the United States, cannot be seized for such violation, after the law has expired, unless some special provision be made therefor by statute.

THIS was an appeal from the sentence of the district court of the United States for the district of New Orleans, which dismissed the libel.

The ship Helen, a vessel of the United States, during the existence of the act of congress of the 28th of February, 1806, "to suspend the commercial intercourse between the United States and certain ports of the island of St. Domingo," (2 Stats. at Large, 351,) had traded with one of the prohibited ports, contrary to that act. The act was suffered to expire on the 25th of April, 1808. Afterwards, to wit, on the 20th of September, 1808, she was seized, on account of that violation of the act, by the collector of the port of New Orleans; but the libel was dismissed by the judge, on the ground that the law had expired.

The United States appealed.

The case was now submitted without argument; and upon the authority of the case of Yeaton, *et al.*, *v.* U. S. 5 C. 281, decided at the last term,

The sentence was affirmed.

3 H. 534.

STEWART *v.* ANDERSON.

6 C. 203.

In an action in Virginia by the assignee of a negotiable promissory note against the maker, the latter may set off a negotiable note of the assignor which he held at the time of re-

ceiving notice of the assignment of his own note, although the note thus set off was not due at the time of the notice, but became due before the note upon which the suit was brought.

ERROR to the circuit court for the District of Columbia.

Stewart, the indorsee of a promissory note, brought his action of debt, under the statute of Virginia, against Anderson, the maker.

The note was made payable to W. Hodgson, and by him [*204] assigned to Stewart. It * was dated the 25th of April, 1807, and payable 180 days after date, for $330,56.

Upon the trial in the court below the jury found a special verdict, which states, that Hodgson transferred to the plaintiff the note in the declaration mentioned; and afterwards, on the 14th of August, 1807, for the first time informed the defendant that the note was transferred, but did not say to whom. At the time of that information, the defendant held a note of W. Hodgson, dated the 29th of June, 1807, for $566,67, which was given for a full and valuable consideration, and payable sixty days after date. When the defendant was informed of the transfer of the note he made no reply. The jury finally conclude by saying that they "find for the defendant, provided the court are of opinion that the verbal notice given by Hodgson to the defendant, on the 14th of August, of the transfer of the note in the declaration mentioned, was not sufficient to bar the defendant's right of offsetting his aforesaid note of $566,67, against the plaintiff's note in the declaration mentioned. But should the court be of opinion that the said notice was sufficient to entitle the plaintiff to the money in the declaration mentioned, as against the defendant, then they find for the plaintiff," &c.

[*205] * Upon this special verdict the judgment of the court below was for the defendant; and the plaintiff brought his writ of error.

THE COURT stopped *E. J. Lee*, contrà.

MARSHALL, C. J. If Hodgson's note had not been payable till after Anderson's, it would have been a different case; but being payable before Anderson's, and holden by Anderson before notice, it is such an offset as he might avail himself of at the trial.

Judgment affirmed.

* The Marine Insurance Company of Alexandria [*206] v. Hodgson.

6 C. 206.

The refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as error.

After a cause is remanded to the inferior court, such court may receive additional pleas, or admit amendments to those already filed, even after the appellate court has decided such pleas to be bad upon demurrer.

In an action of covenant on a policy under seal, all special matter of defence must be pleaded. Under the plea of covenants performed, the defendant cannot give evidence which goes to vacate the policy.

In order to prove the condemnation of a vessel it is only necessary to produce the libel and sentence.

It is a useless practice to read the proceedings at length. The depositions stated in such proceedings are not evidence in an action upon the policy of insurance.

In an action upon a valued policy, it is not competent for the underwriters to give parol evidence that the real value of the subject insured is different from that stated in the policy.

Error to the circuit court of the District of Columbia.

The former judgment of the court below in this cause, in favor of the now plaintiffs in error, having been reversed in this court, and the cause sent back for the trial of the issues of fact,[1] the plaintiffs in error, before the cause could be regularly called for trial according to the rules and practice of the court, moved the court below for leave to amend the pleadings by adding to the former eight pleas, a ninth and a tenth plea.

* But the court below refused to permit the pleadings to [*208] be so amended, in consequence of which the cause went to trial upon the three issues of fact which had already been joined. The material facts, and the substance of the issues on which the trial in the circuit court proceeded, are stated in the opinion of the court.

* The defendants brought their writ of error. [*211]

C. Lee, and *E. J. Lee*, for the plaintiffs in error.

Swann, contrà.

* Livingston, J., delivered the opinion of the court, as [*217] follows:

[1] 5 C. 100.

This is an action of covenant, on a policy of insurance, to which the defendants pleaded; 1. That they had performed all things which, by the policy, they were bound to perform; 2. That the vessel insured was not captured and condemned as in the declaration is mentioned; and, 3. That the vessel insured was not seaworthy; on which pleas issues were taken by the plaintiff.

There were, also, five special pleas, to which there were demurrers, all of which were allowed by the circuit court, except the one to the sixth plea, which, on a writ of error to this court, heretofore brought, was allowed here, and the cause then remanded to the circuit court, for further proceedings to be had therein.[1] On the return of the cause to the circuit court, the defendants moved for leave to file two additional pleas; which motion was denied; and is now relied on, as one of the errors for which the present judgment should be reversed.

This court does not think that the refusal of an inferior court to receive an additional plea, or to amend one already filed, can ever be assigned as error. This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of every case, than by any precise and known rule [*218] of law, and of which the superior court * can never become fully possessed, that there would be more danger of injury in revising matters of this kind, than what might result now and then from an arbitrary or improper exercise of this discretion. It may be very hard not to grant a new trial, or not to continue a cause, but in neither case can the party be relieved by a writ of error; nor is the court apprized, that a refusal to amend or to add a plea was ever made the subject of complaint in this way. The court, therefore, does not feel itself obliged to give any opinion on the conduct of the inferior court, in refusing to receive these pleas. At the same time, it has no difficulty in saying that, even in that stage of the proceedings, the circuit court might, if it had thought proper, have received these additional pleas, or admitted of any amendment in those already filed.

The court below having refused to receive these pleas, the trial proceeded on the three on which issues were joined; and the defendants offered, under them, or some of them, to prove that it was one of the rules of their office, that every order for insurance shall contain as full a description as can be given of the age, tonnage, and equipment of the vessel; and that it was always their practice to make no insurance on a vessel beyond her reasonable value, accord-

[1] 5 C. 100.

ing to the representation given of her age, tonnage, and equipment; and that such rule was known to the plaintiff; and that, to induce them to insure $8,000 on the brig Hope, the plaintiff represented her as a stout, well built vessel, of about two hundred and fifty tons burden, and from six to seven years old, and that she was worth $10,000; in consequence of which, they insured her for $8,000; that, on the contrary, she was not a well built vessel of two hundred and fifty tons burden, and was not from six to seven years old, but was more than eight and a half years old, and had been ill built; and that this difference between her true and her represented built, age, and tonnage, was material to the risks of the voyage insured. This evidence, being objected to, was deemed inadmissible; and this court is now called on to say whether, in this opinion, there was any error.

* However desirable it may be to admit in evidence, on [*219] the general issue, in an action of covenant on a policy of insurance, every thing which may avoid the contract, or lessen the damages, as is done in actions on the case, this court does not know that it possesses the power of changing the law of pleading, or to admit of evidence inconsistent with the forms which it has prescribed. No rule on this subject is more inflexible than that, in actions on deeds, all special matter of defence must be pleaded. Of this rule it is very certain, from a mere inspection of the record, that the defendants cannot allege ignorance. If every thing, then, which is relied on to avoid a contract under seal, must be pleaded, it will, at once, be conceded that none of the matter offered in evidence applied to either of the pleas. The defendants could not thus set up an excuse for not doing that which, by one of the pleas, they professed to have done; and, as to the other pleas, which denied the capture and seaworthiness of the vessel, it will not be pretended that any of this matter supported either of them. The same remarks apply to the second and third bills of exception. Neither fraud nor misrepresentation, as to the value of the vessel, or her age, or tonnage, could be received in evidence, under either of these issues, no more than infancy or coverture, on a plea of *non est factum;* for, most certainly, none of the matters here offered by the defendants, the rejection of which occasioned these exceptions, went, in any degree, to prove either of the pleas on which issue had been joined.

The fourth exception is to the refusal of the court to admit the deposition of William Murray, which appeared among the admiralty proceedings, and which was offered by the defendants to prove that the vessel was not in the due course of her voyage when she was captured, and the condition she was in, at the time of capture. As the

defendants have not, in either of their pleas, relied on a deviation, it may be doubted whether any evidence of that fact were admissible; but, if it were proper, for the purpose of discrediting any testimony which had been offered by the plaintiff, to show where The [*220] Hope had been taken, it is not thought that * the circuit court erred in instructing the jury that the deposition of Murray was not competent evidence to prove that fact. If all the proceedings in the admiralty had been read by the plaintiff without any previous agreement, on the part of the defendants, to save every objection to their contents, excepting the matter of authentication, the court will not say that the defendants might not have insisted on using any deposition, among the papers, which made in their favor; but, as the plaintiff could have read them for no other purpose than to prove the libel and condemnation, and must have attempted to prove no other fact by them, for which purpose it is expressly stated that they were offered, and as the defendants had, by their agreement, explicitly reserved to themselves every objection to their contents, it does not appear reasonable to permit them to select a deposition, as evidence for them, while the plaintiff could not have made use of that, or any other, if ever so favorable to himself. The circuit court, therefore, did not err in the instruction which it gave to the jury on this subject. This court cannot forbear remarking here, that it can never be necessary, in order to prove a condemnation, to produce any thing more than the libel and sentence; although it is a frequent but useless practice to read the proceedings at length.

The fifth exception is taken to a refusal of the circuit court to direct the jury to find damages for the value of the vessel, as agreed in the policy, and, conditionally, for her actual value, if, in the opinion of the court, it was competent for the jury, under any of the issues joined, to inquire into the real value of the vessel. As it had already been decided, and, as this court thinks, correctly, to receive no evidence of the real value of the vessel, there was no error in refusing to give this direction; and, although the plaintiff, at length, consented to permit the defendants to give evidence of the real value of the vessel, saving objections to the competency of such evidence, upon any of the issues of fact, and the jury, thereupon, found conditional damages, this court is of opinion that, as evidence of the real value of the vessel, under any of these issues, was in- [*221] competent, and as objections to its competency * were saved to the plaintiff, the circuit court did right in giving judgment for the damages found by the jury, according to the value of the vessel, fixed in the policy; which judgment this court affirms, with costs.

9 W. 576; 4 H. 131; 6 H. 1.

Slacum v. Pomery.

6 C. 221.

If a foreign bill be indorsed in Virginia, and duly protested for non-payment, the indorser is liable to an action for fifteen per cent. damages; his contract being governed by the law of the place where it was made.

A declaration against an indorser of a foreign bill, which does not allege notice of the protest, is bad, on error.

Error to the circuit court for the District of Columbia, in an action of debt, (under the law of Virginia,) brought by Pomery against Slacum, as indorser of a bill of exchange, dated the 6th of August, 1807, drawn in the island of Barbadoes, by Charles Cadogan, a merchant residing there, at 60 days' sight, upon Barton, Irlam & Higginson, at Liverpool, in England, for 138*l.* 17*s.* 9*d.* sterling, payable to Slacum or order, who indorsed it, at Alexandria, in the District of Columbia, to the plaintiff.

The declaration was "of a plea that he render unto him 138*l.* 17*s.* 9*d.* sterling money of Great Britain, with interest at the rate of five per centum per annum, from the 23d day of December, 1807, until paid, together with 15 per cent. damages on the said 138*l.* 17*s.* 9*d.*, and 10*s.* 6*d.* sterling, of the value of $2.33, current money of the United States, costs of protest, which to him he owes," &c.

It then stated the making and indorsing of the bill, the non-acceptance and non-payment, and the protest for non-payment, "by reason of which premises, and by force of the statute in that case made and provided, action hath accrued to the plaintiff to demand and have of the defendant the said sum of 138*l.* 17*s.* 9*d.* sterling, and interest at the rate of five per cent. per annum, from the 23d of December, 1807, until paid, *together with 15 per cent. [*222] damages, and 10*s.* 6*d.* sterling, of the value," &c.

Upon the trial of the cause on the issue of *nil debet*, the defendant below took a bill of exceptions, stating that evidence was offered of the bill, the indorsement by the defendant to the plaintiff in Alexandria, (both parties being inhabitants of that town,) the protest for non-payment, and that, by the laws of Barbadoes, the damages, upon protested bills of exchange, were only 10 per cent. upon the principal and interest due upon the bill. Whereupon the defendant prayed the court to instruct the jury that the plaintiff was not entitled to recover more than the damages allowed upon protested bills according to the law of Barbadoes, and that he was not entitled in this

case to 15 per cent. damages, which instruction the court refused to give.

The verdict and judgment being for the plaintiff, for the whole amount demanded in the declaration, the defendant brought his writ of error.

[*224] * MARSHALL, C. J., delivered the opinion of the court as follows, namely:

Upon a critical examination of the act of assembly, on which this action is founded, the court is of opinion that it is rightly brought. Although the drawer of the bill was not liable to the damages of Virginia, the indorser is subject to them, he having indorsed the bill in Alexandria. The words of the act are, that where a bill of exchange shall be protested, "the drawer or indorsor shall be subject to 15 per cent. damages thereon." The third section gives an action of debt "against the drawers or indorsors jointly, or against either of them separately. The act of assembly appears to contemplate a distinct liability in the indorsor, founded on the contract created by his own indorsement, which is not affected by the extent of the liability of the drawer. This is the more reasonable, as a bill of exchange is taken as much on the credit of the indorsor, as of the drawer; and the indorsement is understood to be not simply the transfer of the paper, but a new and a substantive contract.

[*225] * There is, however, an objection taken to this declaration. It omits to allege notice of the protest; an omission which is deemed fatal.

It has been argued, that the act of assembly, which gives the action of debt, not requiring notice to be laid in the declaration, that requisite, which is only essential in an action founded on the custom of merchants, is totally dispensed with. But this court is not of that opinion. In giving the action of debt to the holder of a bill of exchange, and in giving it the dignity of a specialty, the legislature has not altered the character of the paper in other respects. It is still a pure commercial transaction governed by commercial law. Notice of the protest is still necessary, and the omission to aver it in the declaration is still fatal.

Had this error been moved in arrest of judgment, it is presumable the judgment would have been arrested; but it is not too late to allege, as error, in this court, a fault in the declaration, which ought to have prevented the rendition of a judgment in the court below.

The judgment is reversed, and the cause remanded, with direction that the judgment be arrested.

After the opinion was delivered, *Youngs* prayed that the cause might be remanded, with leave to amend.

MARSHALL, C. J. Here is a verdict which must be set aside before an amendment can be allowed.

It might be set aside by the court below, but this court can see no reason in the record for setting it aside.

4 H. 131; 5 H. 295.

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*VASSE v. SMITH. [*226]

6 C. 226.

Infancy is a bar to an action by an owner against his supercargo for breach of instructions; but not to an action of trover for the goods. Still, however, infancy may be given in evidence in an action of trover, upon the plea of not guilty; not as a bar, but to show the nature of the act which is supposed to be a conversion.

An infant is liable in trover, although the goods were delivered to him under a contract.

A bill of exceptions ought to state, that evidence was offered of the facts upon which the opinion of the court was prayed.

ERROR to the circuit court for the District of Columbia.

The declaration had two counts; 1st, a special count, charging the defendant Smith, who was a supercargo, with breach of orders; 2d, trover.

The 1st count stated that Vasse, the plaintiff, was owner, and possessed of 70 barrels of flour, and, at the instance and request of the defendant, put it on board a schooner at Alexandria to be shipped to Norfolk, under the care, management, and direction of the defendant, to be by him sold for and on account of the plaintiff, at Norfolk, for cash, or on a credit at 60 days, in good drafts on Alexandria, and negotiable in the Bank of Alexandria. That the defendant was retained and employed by the plaintiff for the purpose of selling the flour as aforesaid, for which service the plaintiff was to pay him a reasonable compensation. That the defendant received the flour at Alexandria, put it on board the schooner, and sailed, with the flour under his care and direction, to Norfolk; "yet the defendant, not regarding the duty of his said employment, so badly, carelessly, negligently, and improvidently behaved himself in said service and employment, and took such little care of the said flour by him so received as aforesaid, that he did not sell the same, or any part thereof, at Norfolk, for cash, or on a credit of 60 days for drafts on

Alexandria, negotiable in the Bank of Alexandria, but the said defendant, on the contrary thereof, by and through his own neglect and default, and through his wrongful conduct, carelessness, and improvidence, suffered the same, and every part of the said 70 barrels of flour, in his possession as aforesaid, to be embezzled, or otherwise to be wholly lost, wasted, and destroyed."

[*227] * The second count was a common count in trover for the flour.

The defendant, besides the plea of not guilty, pleaded infancy to both counts; to which last plea the plaintiff demurred generally.

The court below rendered judgment for the defendant upon the demurrer to the plea of infancy to the first count; and for the plaintiff upon the demurrer to that plea to the second count. Upon the trial, in the court below, of the issue of not guilty, to the count for trover, three bills of exception were taken by the plaintiff.

The first bill of exceptions stated, that the defendant offered evidence to prove that the flour was consigned and delivered to the defendant by the plaintiff under the following letter of instructions:

"Mr. Samuel Smith, — Sir: I have shipped on board the schooner Sisters, Captain ——, bound to Norfolk, 70 barrels of superfine flour, marked A. V., to you consigned. As soon as you arrive there I will be obliged to you to dispose of it as soon as you can to the best advantage for cash, or credit at 60 days in a good draft on this place, negotiable at the Bank of Alexandria. I should prefer the first, if not much difference; however, do for the best of my interest.

(Signed) "Amb. Vasse."

And that the defendant received the flour in consequence of that letter of instructions, and upon the terms therein mentioned. That the flour was not sold by the defendant at Norfolk, but was shipped from thence by him, without other authority than the said letter of instructions, to the West Indies, for and on account of one Joseph Smith, as stated in the bill of lading, which was for 398 barrels, 70 of which were stated in the margin to be marked A. V., 198 I. S., 100 D. I. S., and 30 P. T.

[*228] * That the defendant, when he received the flour, and long after he shipped it, was an infant under the age of twenty-one years. Whereupon the court, at the prayer of the defendant, instructed the jury that if they found the facts as stated, the defendant was not liable upon the count for trover.

The second exception was the admission of evidence of the defendant's infancy.

The third exception stated that, "upon the facts aforesaid, (the facts in the first bill of exceptions mentioned,) the plaintiff prayed the court to instruct the jury that if they shall be of opinion that the defendant was under the age of twenty-one years, and between the age of nineteen and twenty years, and that the defendant of his own head shipped the flour to the West Indies, in a vessel which has been lost by the perils of the sea, and that the said shipment was made with other flour, on account of his father, Joseph Smith, in such case the defendant has thereby committed a tort in regard to the plaintiff, for which he is liable in this action, notwithstanding his infancy aforesaid, which instruction the court refused to give.

The verdict and judgment being against the plaintiff, he brought his writ of error.

E. J. Lee, and *C. Lee*, for the plaintiff in error.

Swann, contrà.

* MARSHALL, C. J., delivered the opinion of the court, as [* 230] follows:

The first error, alleged in this record, consists in sustaining the plea of infancy to the first count in the declaration.

This count states a contract between the plaintiff and defendant, by which the plaintiff committed seventy barrels of flour to the care of the defendant, to be carried to Norfolk, and there sold for money, or on sixty days' credit, payable in drafts on Alexandria, negotiable in the bank. The plaintiff then alleges that the defendant did not perform his duty in selling conformably to his instructions, but, by his negligence, permitted the flour to be wasted so that it was lost to the plaintiff.

This case, as stated, is completely a case of contract, and exhibits no feature of such a tort as will charge an infant. There can be no doubt but that the court did right in sustaining the plea.

The second count is in trover, and charges a conversion of the flour.

That an infant is liable for a conversion is not contested. The circuit court was itself of that opinion, and therefore sustained the demurrer to this plea. But, in the progress of the cause, it appeared *that the goods were not taken wrongfully by the [* 231] defendant, but were committed to his care by the plaintiff, and that the conversion, if made, was made while they were in his custody under a contract. The court then permitted infancy to be given in evidence on the plea of not guilty. To this opinion an exception was taken.

If infancy was a bar to a suit of trover brought in such a case, the court can perceive no reason why it may not be given in evidence on this plea. If it may be given in evidence on *non assumpsit*, because the infant cannot contract, with at least as equal reason may it be given in evidence in an action of trover in a case in which he cannot convert.

But this court is of opinion that infancy is no complete bar to an action of trover, although the goods converted be in his possession, in virtue of a previous contract. The conversion is still in its nature a tort; it is not an act of omission but of commission, and is within that class of offences for which infancy cannot afford protection. Yet it may be given in evidence, for it may have some influence on the question, whether the act complained of be really a conversion, or not.

The court, therefore, does not consider the admission of this testimony as error.

The defendant exhibited the letter of instructions under which he acted, which is in these words: "Sir," &c., but the plaintiff offered evidence that the flour was not sold in Norfolk, but was shipped by the defendant to the West Indies, for and on account of a certain Joseph Smith, as by the bill of lading which was produced. The defendant then gave his infancy in evidence, and prayed the court to instruct the jury, that if they believed the testimony, he was not liable on the second count stated in the plaintiff's declaration, which instruction the court gave, and to this opinion an exception was taken.

This instruction of the court must have been founded on
[*232] the opinion that infancy is a bar to an action of *trover for goods committed to the infant, under a contract, or that the fact proved did not amount to a conversion.

This court has already stated its opinion to be, that an infant is chargeable with a conversion, although it be of goods which came lawfully to his possession. It remains to inquire whether this is so clearly shown not to be a conversion, as to justify the court in saying to the jury, the defendant was not liable in this action.

The proof offered was, that the defendant shipped the goods on account of Joseph Smith. This fact, standing unconnected with any other, would unquestionably be testimony which, if not conclusive in favor of the plaintiff, was, at least, proper to be left to the jury. But it is urged that this statement refers to the bill of lading, from the notes in the margin of which it appears that, although the bill of lading, which was for a much larger quantity of flour, was made out in the name of Joseph Smith, yet, in point of fact, the

shipment was made for various persons, and, among others, for the plaintiff.

The court perceive, in this bill of exceptions, no evidence explanatory of the terms under which this shipment was made, and the marks in the margin of the bill of lading do not, in themselves, prove that the shipment was not made for the person in whose name the bill was filled up.

It is possible that it may have been proved to the jury that this flour was really intended to be shipped on account of the plaintiff, and that the defendant did not mean to convert it to his own use. But the letter did not authorize him so to act. It was not, therefore, a complete discharge; and should it be admitted that an infant is not chargeable with a conversion made by mistake, this testimony ought still to have been left to the jury. The defendant would certainly be at liberty to prove that the shipment was in fact made for Vasse, and that he acquiesced in it so far as to consider the transaction not as a conversion; but without any of *these [*233] circumstances which, if given in evidence, ought to have been left to the jury, the court has declared the action not sustainable.

This court is of opinion that the circuit court has erred in directing the jury that, upon the evidence given, the defendant was not liable under the second count; for which their judgment is to be reversed, and the cause remanded for further proceedings.[1]

11 H. 154.

Custiss v. The Georgetown and Alexandria Turnpike Company.

6 C. 233.

An appeal lies from an order of the circuit court for the District of Columbia, quashing an inquisition in the nature of a writ of *ad quod damnum*.

If a statute merely requires an inquisition to be returned to, and recorded by the clerk of a court, the court has no jurisdiction over it.

Error to the circuit court for the District of Columbia. Under the act of March 3, 1809, (2 Stats. at Large, 539, s. 7,) "to authorize

[1] The Chief Justice noticed also the phraseology of the third bill of exceptions. It prays the opinion of the court upon certain facts, without stating that any evidence of those facts was given to the jury. It is doubtful whether those facts exist in the case, and whether the court would be bound to give an opinion upon them.

the making of a turnpike road, &c.," an inquisition, taken by the marshal, had been returned to the clerk of the county, and on motion of the turnpike company, quashed by the court. From this order Mr. Custiss appealed.

E. J. Lee, for the appellant.

F. S. Key and *C. Lee*, for respondents.

[*235] *MARSHALL, C. J., delivered the opinion of the court, as follows:

At the opening of this case, some doubt was entertained respecting the jurisdiction of the supreme court, but that doubt is removed by an inspection of the act by which the circuit court of the District of Columbia is constituted. The words of that act, descriptive of the appellate jurisdiction of this court, are more ample than those employed in the Judicial Act. They are, that "any final judgment, order, or decree in said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of $100, may be reëxamined and reversed or affirmed in the supreme court."

[*236] The jurisdiction of this court being admitted, the proceedings of the circuit court, in ordering the *inquisition taken between these parties to be quashed, comes on to be examined.

The first objection to this proceeding is, that the court of Alexandria could take no cognizance of the subject, by way of motion.

The validity of this objection depends entirely on the act of congress, under which this inquisition was taken. If it was to be recorded by order of the court, if the judgment of the court was, in any manner, to be exercised upon it, then, in all which has been done, the court has exercised its jurisdiction, and the inquiry will be whether there was sufficient cause for refusing to permit the inquisition to be recorded. If, on the other hand, the clerk was a mere ministerial officer directed by law, to perform a ministerial act, without any superintending agency, on the part of the court, then the court could not, upon motion, prohibit the clerk to perform his duty, and could not legitimately quash the inquisition.

The act of congress directs "that the inquisition, when taken, shall be signed by the marshal and by the jurymen present, and returned by the marshal to the clerk of the county, to be by him recorded."

That the legislature may direct the clerk of a court to perform a specified service, without making his act the act of the court, will not be controverted; and, if this may be done, it is difficult to conceive

words which convey this idea more clearly than those which are employed in this act.

The inquisition is not returnable to the court, but to the clerk. It is not to be recorded by order of the court, but is to be recorded by the clerk, on receiving it from the marshal. It does not derive its validity from being recorded, but remains afterwards liable to all the objections which might be taken to it, previous thereto. If, for example, an inquisition should be recorded which was found by eleven jurors, that inquisition would neither vest the land in the company, nor give a right to * the former proprietor to de- [* 237] mand the money to which it was valued. The inquisition, then, is to be recorded solely for preservation, and the act of recording is a ministerial act which the law directs the clerk to perform, without submitting the paper to the judgment of the court. The law asks not the intervention of the court, and requires no exercise of judicial functions.

The difference between this act and those, the execution of which is superintended by the court, is apparent. In those cases, the instrument is to be brought into court, and acted upon by the court; in this it is to be delivered to the clerk at any time, and acted on by him without the intervention of the court.

This court is unanimously of opinion that the circuit court for the county of Alexandria could not legally entertain the motion for quashing the inquisition found in this case, nor legally prevent their clerk from recording it. Their judgment, therefore, is reversed, and the motion to be dismissed.

12 P. 524.

Lodge's Lessee v. Lee.

6 C. 237.

A grant of an island by name, in the Potomac River, superadding the courses and distances of the lines thereof, which on resurvey are now found to exclude part of the island, will pass the whole island.

Ejectment by Lodge against Lee, for part of an island in the Potomac River, called Eden, but now generally called Lee's Island.

The plaintiff's lessor had taken up the land in the year 1804, as vacant, supposing that the defendant's claim must be bounded by

the course and distance, allowing one degree of variation for every twenty years since the certificate of survey was made under which the defendant claims.

The defendant claimed under a patent from the lord proprietor of Maryland, dated 1723, which granted to Thomas Lee "all that tract or upper island of land, called Eden, lying and being in [*238] Prince George * county, beginning at a bounded maple, near ten miles above the second falls, and opposite to a large run on the Virginia side called Hickory Run, and standing upon a point at the foot of the said island, and running thence north sixty degrees, west sixty perches," &c., &c., (giving the course and distance of every line to the beginning tree,) "containing and laid out for 320 acres of land, more or less."

The court below instructed the jury that the grant to Thomas Lee passed the whole of the island called Eden, and that the lessor of the plaintiff is not entitled to recover. Verdict and judgment for plaintiff; which opinion and judgment were, by this court, without argument, affirmed.

6 P. 691.

Finley v. Lynn.

6 C. 238.

If a bond, executed in performance of articles, depart therefrom by mistake, equity will relieve, but such departure must be clearly shown.

If the members of a copartnership agree among themselves, that the firm shall pay an individual partner's debt, it becomes an equitable claim against the assets of the firm.

Where the complainant was entitled to an account in the court below, but did not apply for it, resting his case on another ground, not tenable, this court will remand the cause to have such account taken.

Error to the circuit court for the District of Columbia, in a suit in chancery by Finley against Lynn. The scope of the bill, and the material facts, are stated in the opinion of the court. The bill, in stating the effect of the contract of dissolution, avers that the defendant ought to have been satisfied when the plaintiff "returned to him the whole jewelry store, with the accession of nearly $3,000 worth of merchandise, and gave up to him the profits of said store, which he believes to be equal to $2,500 more." It was upon this clause in the

bill that Mr. Justice Todd dissented. The bill prayed for an injunction, on account, and general relief.

Swann and *Youngs*, for the appellant.

E. J. Lee and *Jones*, for the respondent.

*MARSHALL, C. J., delivered the opinion of the court, as [*247] follows, namely:[1]

The plaintiff and defendant had been copartners in trade, and had carried on their business in two stores; the one a jewelry store in the name of Lynn, to be conducted exclusively by him; the other a hardware store in the name of Finley & Lynn, to be under the joint management of the partners.

Previous to the commencement of their partnership, Lynn had contracted a debt to Lemuel Wells & Co. of New York, for goods ordered for a jewelry store carried on by himself, which goods it was mutually ageed to transfer to the new concern, and the debt to Lemuel Wells & Co. should become a debt chargeable on the social fund.

In February, 1805, it was agreed to dissolve the copartnership; and articles were entered into to take *effect on the [*248] first day of March. The terms were, "that Adam Lynn shall withdraw all the property put into the joint stock by him, and that he shall have the goods in the jewelry store, and all the debts due to that store, as a compensation in lieu of the profits arising from the whole business; and the said Finley agrees to take, on his own account, the goods in the hardware store, and the goods which are ordered in the spring, and to indemnify the said Adam Lynn from all claims or demands upon the said concern, or which may arise for goods now ordered, and not yet arrived."

On the second of March, a bond of indemnity was executed, the condition of which, after stating the dissolution, proceeds thus: "On which dissolution it was, among other things, agreed that the said Oliver P. Finley should satisfy and pay all debts and contracts due from, or entered into by, the said copartnership, or either of the said copartners, for or on account of, or for the benefit of the said copartnership, including certain debts due from the said Adam Lynn for goods by him ordered, which have been received by the said copartnership, and also all debts which may arise from merchandise hereafter shipped to the said concern, in consequence of any orders heretofore made.

[1] Judge Johnson was absent.

"Now the condition of the above obligation is such, that if the said Oliver P. Finley shall well and truly satisfy and discharge all the debts and contracts hereinbefore described, so as to indemnify and save harmless the said Adam Lynn from the payment of the same, and from any suit or prosecution in law or equity for or on account of the said debts and contracts, then this obligation to be void."

Some time previous to the dissolution, an action had been brought by Lemuel Wells & Co. against Adam Lynn, for the recovery of their debt, which was then depending.

In December, 1806, Adam Lynn, for the first time, claimed, [* 249] under the bond of indemnity, the amount of *the debt to Lemuel Wells & Co., and, payment being refused, instituted a suit on the bond. Supposing that no defence could be made at law, judgment was confessed, with a reservation of all equitable objections to the payment. A bill was then filed suggesting that the bond was executed by mistake, and in the confidence that it was in exact conformity with the articles, and praying that it might be restrained by the articles. Several extrinsic circumstances are also detailed and relied upon as demonstrating that Lynn himself did not suppose, until so informed by counsel, that the bond comprehended this debt.

An injunction was granted, which, on the coming in of the answer, was dissolved, and, on a final hearing, the bill was dismissed.

The answer denies all the allegations of the bill which go to the mistake under which the bond was executed; insists that it conforms to the true meaning of the articles and intent of the parties; and endeavors to explain those extrinsic circumstances on which the plaintiff relied.

That a bond, executed in pursuance of articles, may be restrained by those articles, if the departure from them be clearly shown, is not to be controverted. But in this case, the majority of the court is of opinion that no such departure is manifested with sufficient clearness to justify the interposition of a court of equity.

By the articles of copartnership, the debt to Lemuel Wells & Co. was assumed by the firm of Finley & Lynn, and was payable out of the partnership fund. It is true that, at law, it did not constitute a demand against the partnership, but the court is much inclined to the opinion, that, had Lynn become insolvent, a suit in equity might have been sustained, on this claim, against Finley and Lynn.

[* 250] If it might in equity, though not in law, be a "claim *or demand upon the concern," there does not appear to be such a repugnancy between the bond and the articles as to induce the court to say that the bond, which, so far as is shown in this cause,

was executed without imposition, and with a knowledge of its contents, binds the obligors further than they intended to be bound. The extrinsic circumstances relied on are certainly entitled to much consideration; but they are not thought sufficiently decisive and unequivocal in their character to justify a court of equity in restraining legal rights acquired under a solemn contract.

Though this is the principal object of the bill, it may be understood to contemplate something further. It prays for a settlement of all accounts, and for general relief.

So far as the accounts between the parties are closed by the articles of dissolution, no reason can be assigned for opening them. But if rights, growing out of those articles, require a settlement, the plaintiff is entitled to an account.

By a majority of the court it is conceived that if any profits had arisen on the jewelry store, independent of the goods on hand and of the debts due to the store, the plaintiff is entitled to them. It is not probable that there are such profits; but it is very possible that there may be. Large sums of money may have been received, and might either be on hand when the dissolution took place, or have been diverted to various uses. If such be the fact, the majority of the court is of opinion that any fair construction of the articles gives those profits to the plaintiff. The contract is, that Adam Lynn shall have "the goods in the jewelry store, and all the debts due to that store, as a compensation in lieu of the profits arising from the whole business." Now the profits of the jewelry store, if any, not existing in debts or goods, were certainly a part of the "profits of the whole business," and are, consequently, yielded to the plaintiff.

That this was the deliberate intention of the defendant, *is avowed in his answer. A proposition for a dissolution [* 251] was, he says, made by him in writing and accepted by the plaintiff. That proposition is, "that the defendant should have the merchandise in the jewelry store, and the debts due to that store, as a compensation in lieu of the profits of the whole business; that the complainant should hold the merchandise in the hardware store, and the debts due to it, and the profits of the trade."

Now the profits of the jewelry store are certainly a part of the "profits of the trade."

The plaintiff also claims a debt said to be due from the jewelry store to the hardware store.

As all the debts due to the hardware store are obviously assigned to Finley, this debt becomes his property, unless his claim to it is relinquished by the undertaking to pay all debts due from the concern.

The words of this undertaking are to be looked for in the condition of his bond. He is to "satisfy and pay all debts and contracts due from, or entered into by, the said copartnership, or either of the said copartners, for or on account of or for the benefit of the said copartnership."

The terms of this stipulation appear to the court to be applicable to claims upon the copartnership, and not to claims of a part of the company on the other part. He is to satisfy and pay all debts and contracts due from, or entered into by, the said copartnership, not to release the claim of one store upon the other. This is a claim which did not exist upon the copartnership, and which grows out of the articles of dissolution. Those articles assign to the plaintiff all the profits of the hardware store, as well as the debts due to it. They separate what was before united. They draw the distinction between the hardware and the jewelry store, and make the debt due to the hardware store a part of the profits of that store.

[*252] *The residue of the condition does not affect the question, and need not be recited.

It is, then, the opinion of a majority of the court that, if there was really a debt due from the jewelry store to the hardware store, Finley is entitled to that debt.

This is a proper subject for an account.

The plaintiff has probably not applied for this account in the court below, and it does not appear to be a principal object of his bill. This court, therefore, doubted whether it would be most proper to affirm the decree dismissing the bill with the addition that it should be without prejudice to any future claim for profits, and for the debt due from one store to the other, or to open the decree and direct the account. The latter was deemed the more equitable course. The decree, therefore is to be reversed, and the cause remanded, with directions to take an account between the two stores, and an account of the profits of the jewelry store, if the same shall be required by the plaintiff.

Todd, J., concurred in the opinion of the court that the debt of Wells & Co. was a debt to be paid by Finley, but he differed upon the other part of the case, being of opinion, that the complainant was not entitled to a relief which by his bill he had made a merit of waiving.

Decree reversed, and the cause remanded, with directions to reinstate the injunction, and take an account.

De Butts v. Bacon and others.

6 C. 252.

If an agent, who has, by permission of his principal, sold 8 per cent. stock, applies the money to his own use, and being pressed for payment gives a mortgage to secure the repayment of the amount of the stock with 8 per cent. interest thereon, it is usury.

Error to the circuit court for the District of Columbia, in a suit in chancery, brought by Samuel De *Butts against [* 253] James Bacon and others, the object of which was to foreclose a mortgage made by Bacon to De Butts. The condition of the mortgage was, that if the defendant, Bacon, should pay to the complainant the interest of eight per cent. upon one thousand dollars of eight per cent. stock of the United States, loaned by the complainant to the defendant, and should further pay to the complainant "the said sum of one thousand dollars," &c., the deed should be void.

The defendant, Bacon, pleaded the statute of usury, alleging that it was a loan of money and not of stock.

The facts of the case appeared to be, that the complainant, Samuel De Butts, intending to speculate in a voyage with Captain Elias De Butts, authorized the latter to sell $1,000 of eight per cent. stock of the United States, which he did through the agency of the defendant, Bacon, who received the money. The plan of the voyage not having been prosecuted, the complainant wished to get his stock back again, but could not get either the stock or the money from Bacon. It was, however, finally agreed, that Bacon should be considered as answerable for the stock, and should give a mortgage to secure the repayment of the stock, and eight per cent. interest.

The court below decided the contract to be usurious, and decreed the mortgage to be void. Which decree, this court, after argument, by *Swann*, for the appellant, and *Youngs*, for the appellees, affirmed.

Sheehy v. Mandeville and Jamesson.

6 C. 253.

If a negotiable note of one joint debtor be received in payment, the debt is extinguished.

A judgment against one joint debtor, in an action of assumpsit, can not be pleaded in bar by the other alone, in an action against both, founded on the original promise of both.

ERROR to the circuit court for the District of Columbia. The substance of the pleadings, and the material facts, are stated in the opinion of the court.

E. J. Lee, and *Jones*, for the plaintiff.

Youngs, and *C. Lee*, for the defendant.

[*261] * MARSHALL, C. J., delivered the opinion of the court as follows, namely:

[*262] The plaintiff sold certain goods to Robert B. * Jamesson, a merchant of Alexandria, and took his note for the amount, which he put in suit, and prosecuted to a judgment. Afterwards, supposing the other defendant, Mandeville, to be a secret partner, he instituted a suit against Mandeville and Jamesson. The declaration contains three counts. The first is on the note, and charges it to have been made by the defendants, under the name, firm, and style of Robert B. Jamesson. The second and third counts are for goods, wares, and merchandise, sold and delivered to the defendants, trading under the firm of Robert B. Jamesson.

The defendant, Mandeville, pleads two pleas in bar. The first goes to the whole declaration, and the second applies only to the first count.

The first commences with a protestation that the goods, &c., in the declaration mentioned, were not sold to the defendants jointly, and then pleads in bar the promissory note which is averred to have been given and received for, and in discharge of, an account for sundry goods, wares, and merchandise, sold and delivered to the said Jamesson, and that the goods in the declaration mentioned are the same which were sold and delivered to the said Jamesson, and for which the said note was given. The plea also avers, that a suit was instituted and judgment obtained on the note, and concludes in bar.

The second plea pleads the judgment in bar of the action.

To the first plea the plaintiff demurs specially, and assigns for cause of demurrer,

1. That the defendant does not traverse the *assumpsit* laid in the declaration.

2. That he does not expressly confess or deny, that the goods, &c., were sold and delivered to the defendants, trading under the firm of R. B. Jamesson, or that the note was given by the said firm.

[*263] *3. Because an unsatisfied judgment against Jamesson is no bar to an action against Mandeville.

4. It is not averred that the judgment has been satisfied.

5. The defendant does not deny or admit that he assumed to pay for the goods, &c., in the declaration mentioned.

6. Because the plea is no answer to the declaration, or any count thereof, and is informal.

The defendant joins in demurrer.

To the second plea the plaintiff also demurs specially, and assigns, for cause of demurrer, the same, in substance, which had been assigned to the first plea, and the defendant joins in the demurrer to this plea likewise.

The other defendant, Jamesson, has put in no plea, nor are there any proceedings against him subsequent to the declaration.

Although the first plea is not expressly limited to the second and third counts, yet it would seem, from its terms, to be intended to apply to them alone. It sets up a bar to an action on an *assumpsit* for goods, wares, and merchandise, sold and delivered, and no such *assumpsit* is laid in the first count.

If, however, it be considered as pleaded to the first count, it is clearly ill on demurrer. For it does not deny or avoid the joint *assumpsit* laid in that count.

It remains to inquire whether this plea contains a sufficient bar to the second and third counts.

The plea is, that the note was given and received for, and in discharge of, an account or bill for goods, wares, and merchandise, sold and delivered by the plaintiff to Robert B. Jamesson, which are the same goods, &c., that are mentioned in the plaintiff's declaration.

* That a note, without a special contract, would not, of [*264] itself, discharge the original cause of action, is not denied.

But it is insisted that if, by express agreement, the note is received as payment, it satisfies the original contract, and the party receiving it must take his remedy on it.

This principle appears to be well settled. The note of one of the parties, or of a third person, may, by agreement, be received in payment. The doctrine of *nudum pactum* does not apply to such a case; for a man may, if such be his will, discharge his debtor without any consideration. But, if it did apply, there may be inducements to take a note from one partner liquidating and evidencing a claim on a firm which might be a sufficient consideration for discharging the firm. Since, then, the plaintiff has not taken issue on the averment that the note was given and received in discharge of the account, but has demurred to the plea, that fact is admitted; and, being admitted, it bars the action for the goods.

The special causes of demurrer which are assigned, do not, in any

manner, affect the case. Whether the promise was made by Mandeville, or not, ceases to be material, if a note has been received in discharge of that promise, and the payment of the note need not be averred, since its non-payment cannot revive the extinguished *assumpsit*.

The next subject of consideration is the second plea, which applies singly to the first count.

That count is on a note charged to have been made by Mandeville and Jamesson, trading under the firm of Robert B. Jamesson. This, not being denied, must be taken as true.

The plea is, that a judgment was rendered on this note against Robert B. Jamesson.

[*265] *Were it admitted that this judgment bars an action against Robert B. Jamesson, the inquiry still remains, if Mandeville was originally bound, if a suit could be originally maintained against him, is the note, as to him, also merged in the judgment?

Had the action, in which judgment was obtained against Jamesson, been brought against the firm, the whole note would most probably have merged in that judgment. But that action was not brought against the firm. It was brought against Robert Brown Jamesson singly, and whatever other objections may be made to any subsequent proceedings on the same note, it cannot be correctly said that it is carried into judgment as respects Mandeville. If it were, the judgment ought in some manner to bind him, which most certainly it does not. The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not afterwards be maintained against the others, which is not admitted) can be applied only to a case in which the original declaration was on a joint covenant, not to a case in which the declaration in the first suit was on a sole contract.

In point of real justice there can be no reason why an unsatisfied judgment against Jamesson should bar a claim upon Mandeville; and it appears to the court that this claim is not barred by any technical rule of law, since the proceedings in the first action were instituted upon the *assumpsit* of Jamesson individually.

It is not necessary to decide whether this action could have been maintained against Mandeville singly with an averment that the note was made by Mandeville and Jamesson. The declaration being against both partners, that question does not arise. The declaration is clearly good in itself, and the plaintiff may recover under it, unless he be barred by a sufficient plea.

Admitting, for the present, that a previous *judgment [*266] against Jamesson would be a sufficient bar, as to him, had Jamesson and Mandeville joined in the same plea, it would have presented an inquiry of some intricacy, how far the benefit of that bar could be extended to Mandeville.

But they have not joined in the same plea. They have severed; and as the whole note is not merged in a judgment obtained against Jamesson, on his individual *assumpsit*, the court is not of opinion that Mandeville has so pleaded this matter as to bar the action.

In this plea it was necessary to negative the averment of the declaration, that the note was made by Mandeville as well as Jamesson, or to show that the judgment was satisfied. The defendant has not done so. He has only stated affirmatively new matter in bar of the action, which new matter, as stated, does not furnish a sufficient bar. It is not certain that this plea would have been good on a general demurrer, but on a special demurrer it is clearly ill.

The judgment, therefore, is to be reversed, and, as no other plea is pleaded, judgment must be rendered, on the first count, in favor of the plaintiff.

The judgment of the court was as follows: This cause came on to be heard on the transcript of the record, and was argued by counsel; on consideration whereof the court is of opinion, that there is error in the judgment of the circuit court in overruling the demurrer to the first plea, so far as the same is pleaded in bar of the first count in the declaration, and that there is error in overruling the demurrer to the second plea; wherefore it is considered by this court, that the judgment of the circuit court be reversed and annulled, and that the cause be remanded to the circuit court, with directions to sustain the demurrer to the first plea so far as the same is pleaded in bar of the first count, in the plaintiff's declaration, and also to sustain the demurrer to the second plea, and to render *judgment in [*267] favor of the plaintiff on his said first count, and to award a writ of inquiry of damages.[1]

8 C. 30; 5 P. 529; 12 P. 32; 9 H. 83.

[1] After the opinion was given, *C. Lee* moved for a direction to the court below to allow a plea of *non assumpsit*. The court said they had never given directions respecting amendments, but had left that question to the court below. This court cannot now undertake to say whether the court below would be justified in granting leave to amend.

SKILLERN'S EXECUTORS *v.* MAY'S EXECUTORS.

6 C. 267.

It is too late to question the jurisdiction of the circuit court after the cause has been sent back by mandate.

THIS was a case certified from the circuit court for the district of Kentucky, the judges of that court being divided in opinion.

The former decree of the court below had been reversed in this court, and the cause "remanded for further proceedings to be had therein, in order that an equal and just partition of the 2,500 acres of land, mentioned in the assignment of the 6th of March, 1785, be made between the legal representatives of the said George Skillern and the said John May." (*Vide* 4 C. 141; *ante*, 47.)

The cause being before the court below upon the mandate, the question occurred which is stated in the following certificate, namely: "In this case a final decree had been pronounced, and by writ of error removed to the supreme court, who reversed the decree, and after the cause was sent back to this court it was discovered to be a cause not within the jurisdiction of the court; but a question arose whether it can now be dismissed for want of jurisdiction, after the supreme court had acted thereon. The opinion of the judges of this court being opposed on this question, it is ordered 'that the same be adjourned to the supreme court for their decision, &c.'"

THIS COURT, after consideration, directed the following opinion to be certified to the court below, namely:

[*268] * "It appearing that the merits of this cause had been finally decided in this court, and that its mandate required only the execution of its decree, it is the opinion of this court that the circuit court is bound to carry that decree into execution, although the jurisdiction of that court be not alleged in the pleadings."

10 W. 192; 3 P. 193; 12 P. 339; 2 H. 9; 3 H. 413; 6 H. 31; 8 H. 586.

The Chesapeake Insurance Company v. Stark.

6 C. 268.

The right to abandon exists during the detention under a capture, but it must be exercised within a reasonable time after notice of the loss.

What is a reasonable time is a question for a jury under the direction of the court. A supercargo, after capture, acts for whom it may concern, and if an abandonment be duly made he is the agent of the insurer.

Error to the circuit court of the United States for the district of Maryland, in an action of covenant upon a policy of insurance upon goods on board the ship Minerva, from Philadelphia to Laguira, and back to Philadelphia.

The cause was tried upon the issue of *non infregit conventionem*, and the jury found a special verdict, stating the following facts:

On the 5th of March, 1807, Christian Dannenberg, as agent of the plaintiff, who was a citizen of Pennsylvania, shipped for Laguira, on account, and at the sole risk, of the plaintiff, sundry goods, being American property, and regularly documented as such, to the value of $8,700 and upwards, on board the ship Minerva, and consigned them to William Parker, supercargo on board. On the 12th of March she sailed with the goods from Philadelphia for Laguira.

On the 21st of March, Charles G. Boerstler, for the plaintiff, effected an insurance with the Chesapeake Insurance Company, who are citizens of the State of Maryland, upon the goods, to the amount of $8,700, by the policy mentioned in the declaration, which was executed under the common seal of the company.

On the outward voyage she was captured by a British privateer, and carried into Curraçoa. On the 29th of April, 1807, the captain made a protest. On the 13th of June, 1807, the [*269] ship and goods being still in possession of the captors at Curraçoa, and there detained by them, the said Charles G. Boerstler, "for the plaintiff," abandoned to the Chesapeake Insurance Company, the goods shipped by Dannenberg for the plaintiff, by a letter to the president and directors of the Chesapeake Insurance Company, the defendants, in the words and figures following:

"Baltimore, June 13, 1807.

"*President and Directors of the Chesapeake Insurance Company,*

"Gentlemen: Having this morning received a letter from Mr. C.

Dannenberg, of Philadelphia, the agent for Mr. John Philip Stark, of Hanover, ordering me to abandon the goods shipped by him, for Mr. Stark's account, on board the American ship Minerva, Captain Newcomb, carried into, and detained at Curraçoa, on her voyage from Philadelphia to Laguira, whereby the object of the expedition is totally frustrated and destroyed, I herewith abandon to you the whole of Mr. Stark's interest in the cargo of The Minerva, which you have insured in your office.

"I have the honor to be, gentlemen,

"your most obedient servant,

"CHARLES G. BOERSTLER."

Which abandonment the defendants then refused to accept.

W. Parker, the supercargo, addressed a memorial to the governor of Curraçoa, on the 19th of June, 1810, in which he complains of the detention as being of the most ruinous consequences to the owners.

On the 25th of July, 1807, the vessel and cargo being still detained at Curraçoa, in the possession of the captors, Parker entered into an agreement with I. F. Burke, the owner of the privateer, by
[*270] which a certain * part of the goods should be appraised and the price paid by Parker, to be repaid by Burke in case the goods should not be adjudged good prize; and that a certain other part should be kept by Burke, upon his engaging to pay the value thereof in the like case. In consequence of which agreement the vessel was liberated, and proceeded to Laguira, where the goods were sold, and produced about $5,900.

Parker employed an agent to attend the trial at Tortola, and to claim the goods for the plaintiff; but a trial was never had, nor any proceedings instituted for the purpose of obtaining an adjudication.

On the 22d of August, 1807, Dannenberg, as agent of the plaintiff, executed a deed to the Chesapeake Insurance Company, transferring to them all his right and title to the goods, as attorney of the plaintiff, which deed they refused to receive.

Winder and *Martin*, for the plaintiffs in error.

Harper, for the defendant.

[*272] * MARSHALL, C. J., delivered the opinion of the court, as follows:

On the principal question in this case the court can entertain no doubt. On the capture of The Minerva, the right to abandon was complete, and this right was exercised during her detention.

The objections to the form of the abandonment are not deemed substantial. The agent who made the insurance might certainly be credited, and, in transactions of this kind, always is credited, when he declares that, by the order of his principal, he abandons to the underwriters. In this case, the jury find that the abandonment was made for the plaintiff; and this finding establishes that fact.

The informality of the deed of cession is thought unimportant, because, if the abandonment was unexceptionable, the property vested immediately in the underwriters, and the deed was not essential to the right of either party. Had it been demanded and refused, that circumstance might have altered the law of the case.

If the abandonment was legal, it put the underwriters completely in the place of the assured, and Parker became their agent. When he contracts on behalf of the owners of the goods, he contracts on behalf of the underwriters, who have become owners, not on behalf of Stark, who has ceased to be one. His act is no longer the act of Stark, and is not to be considered as an interference, on his part, which may affect the abandonment. If any particular instructions had been given on this subject, if any act of ownership had been exerted by Stark himself, such conduct might be construed into a relinquishment of an abandonment which had not been accepted; but as nothing of the kind exists, the act of the supercargo is to be considered as the act of the persons interested, whoever they may be.

* The only point which presents any difficulty in the opi- [*273]
nion of the court, is the objection founded on the omission, in the verdict, to find that the abandonment was made in reasonable time.

The law is settled that an abandonment, to be effectual, must be made in reasonable time; but what time is reasonable is a question compounded of fact and law, which has not yet been reduced to such certainty as to enable the court to pronounce upon it, without the aid of a jury. Certainly the delay may be so great as to enable every man to declare, without hesitation, that it is unreasonable, or the abandonment may be so immediate, that all will admit it to have been made in reasonable time; but there may be such a medium between these extremes, as to render it doubtful whether the delay has been reasonable or otherwise. If it was a mere question of law which the court might decide, then the law would determine, to a day or an hour, on the time left for deliberation, after receiving notice of the loss. But the law has not so determined, and it therefore remains a question compounded of fact and law, which must be found by a jury under the direction of the court.

In this case the jury have found an abandonment, but have not

found whether it was made in due time or otherwise. The fact is, therefore, found defectively; and for that reason a *venire facias de novo* must be awarded.

It may not be amiss to remark that the judicial opinions which we generally find in the books, on these subjects, are usually given by way of instruction to the jury, or on a motion for a new trial, not on special verdicts. The distinction between the cases deserves consideration.

Judgment reversed, and the cause remanded, with direction to award a *venire facias de novo*.

4 P. 139; 8 P. 201; 8 H. 475.

LIVINGSTON and GILCHRIST *v.* THE MARYLAND INSURANCE COMPANY.

6 C. 274.

If the interest of one joint owner of a cargo be insured, and if that interest be neutral, it is no breach of the warranty of neutrality if the other joint owner, whose interest is not insured, be a belligerent.

The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.

The effect of a misrepresentation or concealment, upon a policy, depends upon its materiality to the risk, which must be decided by a jury under the direction of a court.

The right to abandon may be kept in suspense by mutual consent.

If foreign laws and regulations respecting trade be not proved to have been in writing as public edicts, they may be proved by parol.

If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured to take such papers, the non-disclosure of the fact that they would be on board will vacate the policy.

ERROR to the circuit court of the United States for the district of Maryland, in an action of covenant upon a policy of insurance against capture only, upon goods laden on board the ship Herkimer, from Guyaquil, or her last port of discharge in South America, to New York; the goods were warranted to be American property, "proof of which to be required in the United States only." The ship and cargo were captured by a British ship of war, and condemned at Halifax as prize.

The defence set up by the underwriters was,

1. That one Baruso, a Spanish subject, was interested in the cargo, and that Baruso being a subject of one of the belligerents, the warranty of neutrality was forfeited.

2. That certain Spanish papers were found on board, stating the cargo to be the property of Baruso, and although Baruso might not be interested in the cargo, yet these papers, not being necessary, according to the usual course of the trade, were the cause of the condemnation, and as this cause proceeded from the act of the insured, the underwriters were not liable.

3. That although the interest of the plaintiffs Livingston & Gilchrist, was neutral, yet the concealment of the interest of Baruso vitiated the policy.

4. That the abandonment was not made in due time.

To these objections the plaintiffs answered,

1. That Baruso was not part owner of the goods; he had only a contingent interest in the profits of the voyage. That the subject insured was only the *interest of the plaintiffs, [*275] which was strictly neutral property.

2. That the Spanish papers were necessary to carry on the voyage insured, according to the nature and course of the trade.

3. That the interest of Baruso was not such as they were bound to disclose.

Upon the trial of the issue of *non infregit conventionem*, the jury found a special verdict; and a bill of exceptions was taken by the plaintiffs in error to the instruction of the court to the jury, that parol evidence was not competent to prove, "that, according to the uniform and long standing laws of Spain, relative to the trade of her colonies in America, and especially of Peru, no goods could, at and about the time of the making the policy in the declaration mentioned be imported into, or exported from, the colony of Peru, from, or to any other than a Spanish port in Europe, or in any other than a Spanish bottom, without a special license from the king of Spain for that purpose; and that such licenses, at and about the said time, were never granted, with respect to the said colony of Peru, to any but Spanish subjects; and that, according to the constant course and usage of the trade, to and from that colony, under such licenses, it was usual and necessary for the property to appear, in the said colony, and at its departure therefrom, as the property of a Spanish subject, and of the person holding the license, to be accompanied by such Spanish papers as were necessary to give it that appearance, and to be cleared out as such from the port of departure in Peru; such licenses, not being avowedly transferable; although by observing the above-mentioned formalities and precautions, American property, at and about the same time, might be, and sometimes was, imported into, and exported from, the said colony by American citizens, by virtue, and under the protection, of such licenses."

[*276] The order for insurance, which was supposed to * amount to a representation that the whole cargo was neutral property, was contained in a letter from the plaintiff Gilchrist, to Webster & Co., at Baltimore, in which he says, "on the recommendation of Messrs. Church & Demmill, I take the liberty of requesting you to effect insurance in your city on the cargo of the ship Herkimer, Church, master, from Guyaquil, on her last port of departure in South America, to New York, against loss by capture only, warranted American property, and free from all loss on account of seizure, for illicit or prohibited trade. The owners are already insured against the dangers of the seas, and all other risks except that of capture. You will please to insure to the amount of fifty thousand dollars in valued policies. You have already had a description of the ship from Messrs. Church & Demmill, the agents of Mr. Jackson, who is the owner, and which I presume is correct. By a letter received from Mr. James Baxter, the supercargo, dated at Lima, the 23d of September, 1805, he did not expect The Herkimer would sail from Guyaquil until the last of February. I think proper to mention, that the insurance will be on account of Mr. Brockholst Livingston and myself. Mr. Baxter and Mr. Griswold are also concerned, but the first gentleman thinks there is so little danger of capture, that, in his letter from Lima, he expressly directs no insurance to be made for him against this risk, and Mr. Griswold is not here to consult. Both these gentlemen, as well as those for whom you are desired to make insurance, are native Americans."

The description of the ship, as given by Church & Demmill, and referred to in the above letter, was as follows: "She is a fine ship of about 400 tons burden, about three years old, sheathed, and coppered to the bends, built in the State of New York, and her owner a native American citizen. She sailed from Boston on the 12th day of May last, bound for Lima, with liberty to go to one other port in South America, not west of Guyaquil, and from thence to New York."

"She has permission to trade there."

[*277] * On the 5th of June, 1806, the plaintiff, Gilchrist, wrote to Webster & Co., at Baltimore, informing them of the capture of the vessel, and that the plaintiffs had sent an agent to Halifax, to act in behalf of the concerned, and desiring that this information should be communicated to the underwriters, and assurances that the plaintiffs should act throughout with due regard to their respective interests. He then says, "I should like them to approbate the owners, in taking every measure they may judge best for our mutual interest, without prejudice to our right. I ought, like-

wise, to mention, that one of the owners has also gone in her, so the underwriters will observe every measure calculated to protect their and our interest has been speedily pursued." This letter was laid before the underwriters, who returned it with their answer indorsed thereon, "read, and approved."

On the 22d of August, 1806, after the condemnation in the court of vice-admiralty, the plaintiffs abandoned to the underwriters.

The cause was argued by *Harper*, for the plaintiffs in error, and by *Winder*, *Key*, and *Martin*, for the defendants.

MARSHALL, C. J., delivered the opinion of the court, as follows:

In this case several questions have occurred on which the court has not yet formed an opinion. The application of rules and principles, which have been framed for an action on the case, to an action of covenant, is an operation of some difficulty. The court has not decided with precision, on the extent of the plea, that the defendant has not broken his covenant, nor on the testimony which may be admitted under that plea. Some difficulty, also, arises from the circumstances, that the parties have gone to trial under the expectation that the whole merits of the case were * open, [*278] under the issue which was joined, and that such expectation was authorized by the invariable usage of the court of Maryland, and of the circuit court sitting in that State.

Upon the inspection of the special verdict in this case, it is supposed that, however these points may be decided, a *venire facias de novo* would probably be awarded; and, as the delay of a term would be a great inconvenience to the parties, it is deemed advisable to award it now.

There are, however, some points, which have been argued at great length, on which an opinion has been formed, which will now be delivered.

It is essential, in this form of action especially, to distinguish accurately between the warranty contained in the policy, and those extrinsic circumstances, such as misrepresentation or concealment, which have been deemed sufficient to discharge the underwriters. Although the effect of a breach of a warranty, and of a material misrepresentation, may be the same on a policy, yet they cannot be confounded together, in deciding on pleadings or on a special verdict.

The warranty, in this case, is in these words: "warranted, by the assured, to be American property, proof of which to be required in the United States only."

The interest insured is admitted to be American property, in the strictest sense of the term; but it is contended, that Baruso, a Spanish subject, had an interest in the cargo, which falsifies the warranty.

Whether Baruso could be considered as having an interest in the cargo or not, is a question of some intricacy, which the court has not decided; and which, if determined in the one way or the other, would not affect the warranty; because, the assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral.

[*279] *If the assured represented the whole cargo to be neutral, when it was not, or if they concealed the interest of a belligerent, when it ought to have been disclosed, which facts this court neither affirm nor deny, the effect of the misrepresentation or concealment on the policy, depends on its materiality to the risk. This must be decided by a jury under the direction of a court. In this case, it has not been decided. Consequently, were it even to be admitted that, under the peculiar circumstances of this case, these facts might be taken into consideration, without being specially pleaded, a *venire facias de novo* would be necessary, in order to ascertain their materiality.

So, too, with respect to the Spanish papers found on board.

It is said that the verdict finds their materiality, by finding that the fair premium on American property disguised as Spanish, on the voyage insured, was twenty-five per cent., whereas the premium, in this case, was only ten per cent.

But, it does not appear to the court that this property was, by these papers, disguised as Spanish. It is found to have been the constant course of the trade to have them on board, and, consequently, they cannot be understood to disguise the property as Spanish, when there are other papers which prove it to be American.

It is, too, as yet, undecided, that this matter could be given in evidence, on this issue.

Although this verdict, and these pleadings, do not present the merits of the cause in such form as to enable the court to decide them, there are some insulated points, from which the cause may be relieved.

The reference to the letter of Church & Demmill, which was made by the assured, in their letter of the 26th of March,

[*280] to Alexander Webster & Co., has *been treated both as a representation, and as a warranty, which is falsified by the sentence of condemnation.

There is no color for this opinion.

Most clearly it is not a warranty, for it is not introduced into the policy; and if it were a representation, it only goes to the actual state of the ship, at the time, not to her future conduct.

But it is not even a representation. Marshall, 336, is full and clear on this point.

The letter of the assured, of the 5th of June, is understood to ask the permission of the underwriters to keep their right to abandon in a state of suspense, and the note made by the president and directors, on that letter, is understood as granting that permission. It is difficult to ascribe this letter to any other motive.

It has been asked, for how long a time is this permission given? The answer is obvious. It is, at least, to continue while the property continued in its then situation, unless it should be sooner determined by one of the parties. The assured might abandon previous to the sentence, or immediately afterwards; and the underwriters might, at any time, require the assured to elect immediately, either to abandon or to waive the right so to do. Since they have not made this communication, their original permission continued in force. But the jury have not found that the abandonment was or was not in due time.

It is also the opinion of the court that, as the laws and regulations, by which this trade was regulated, are not proved to have been in writing, as public edicts, but may have depended on instructions to the governor, they may be proved by parol.

The judgment is to be reversed, because the special verdict is defective; and the cause remanded, with directions to award a *venire facias de novo*.

*In the second case, it is ordered to be certified, that, if [*281] the jury should be of opinion that the Spanish papers, mentioned in this case, were material to the risk, and that it was not the regular usage of the trade insured to take such papers on board, the nondisclosure of the fact that they would be on board, would vitiate the policy; but if the jury should be of opinion that they were not material to the risk, or that it was the regular usage of the trade to take such papers on board, that they would not vitiate the policy.

8 H. 234, 470.

Hudson and Smith *v.* Guestier.

6 C. 281.

A foreign condemnation for breach of a municipal regulation is valid, though the seizure is alleged and proved, in a collateral action here, to have been made on the high seas.

Error to the circuit court for the district of Maryland, in an action of trover for coffee and logwood, the cargo of the brig Sea Flower, which had been captured by the French, for trading to the revolted ports of the island of Hispaniola, contrary to the ordinances of France, and carried into the Spanish port of Baracoa, but condemned by a French tribunal at Gaudaloupe, and sold for the benefit of the captors, and purchased by the defendant Guestier.

Upon the former trial of this case in the court below, a statement of certain facts was agreed to by the counsel for the parties, and read in evidence to the jury, who then found a verdict for the plaintiffs. One of the facts so admitted, and which was then deemed wholly immaterial by both parties, was, that The Sea Flower was captured within one league of the coast of the island of Hispaniola. Upon this fact, which was the only fact in which this case differed from that of Rose *v.* Himely, (4 C. 241, *ante*, 87,) the supreme court reversed the first judgment of the court below, (4 C. 293, *ante*, 107,) which had been for the plaintiffs, and remanded the cause for further proceedings.

Upon the second trial in the court below, the verdict and judgment were for the defendant.

[* 282] *The plaintiffs took a bill of exceptions to the opinion of the court, who directed the jury "that if they find from the evidence produced, that the brig Sea Flower had traded with the insurgents at Port au Prince, in the island of St. Domingo, and had there purchased a cargo of coffee and logwood, and, having cleared at the said port, and coming from the same, was captured by a French privateer, duly commissioned as such, within six leagues of the island of St. Heneague, a dependency of St. Domingo, for a breach of said municipal regulations, that in such case the capture of The Sea Flower was legal, although such capture was made at the distance of six leagues from the said island of St. Domingo, or St. Heneague, its dependency, and beyond the territorial limits or jurisdiction of said island, and that the said capture, possession, subsequent condemnation and sale of the said Sea Flower, with her

cargo, devested the said cargo out of the plaintiffs, and the property therein became vested in the purchaser."

Harper, for the plaintiff in error.

P. B. Key, and *Martin*, contrà.

*LIVINGSTON, J. In this case, when here before, I dis- [*283]
sented from the opinion of the court, because I did not think that the condemnation of a French court at Guadaloupe, of a vessel and cargo lying in the port of *another [*284]
nation, had changed the property: but this ground, which was the only one taken by two of the judges in this case, and by three, in that of Himely *v.* Rose, and was principally and almost solely relied on at bar, was overruled by a majority of the court, as will appear by examining those two cases, which were decided the same day. I am not, therefore, in determining this cause, as it now comes up, at liberty to proceed upon it; and such must have been the opinion of Judge Chase, on the trial of it, who was one of the court who had proceeded on that principle.

Considering it, then, as settled that the French tribunal had jurisdiction of property seized under a municipal regulation, within the territorial jurisdiction of the government of St. Domingo, it only remains for me to say whether it will make any difference if, as now appears to have been the case, the vessel were taken on the high seas, or more than two leagues from the coast. If the *res* can be proceeded against when not in the possession or under the control of the court, I am not able to perceive how it can be material whether the capture were made within or beyond the jurisdictional limits of France; or in the exercise of a belligerent or municipal right. By a seizure on the high seas, she interfered with the jurisdiction of no other nation, the authority of each being there concurrent. It would seem also that, if jurisdiction be at all permitted where the thing is elsewhere, the court exercising it must necessarily decide, and that ultimately, or subject only to the review of a superior tribunal of its own State, whether, in the particular case, she had jurisdiction, if any objection be made to it. And, although it be now stated, as a reason why we should examine whether a jurisdiction was rightfully exercised over The Sea Flower, that she was captured more than two leagues at sea, who can say that this very allegation, if it had been essential, may not have been urged before the French court, and the fact decided in the negative? And, if so, why should not its decision be as conclusive on this as on any other

point? The judge must have had a right to dispose of every question which was made on behalf of the owner of the pro-
[*285] perty, * whether it related to his own jurisdiction, or arose out of the law of nations, or out of the French decrees, or in any other way: and, even if the reasons of his judgment should not appear satisfactory, it would be no reason for a foreign court to review his proceedings, or not to consider his sentence as conclusive on the property.

Believing, therefore, that this property was changed by its condemnation at Guadaloupe, the original owner can have no right to pursue it in the hands of any vendee under that sentence, and the judgment below must, therefore, be affirmed.

The other judges, except the chief justice, concurred.

MARSHALL, C. J., observed, that he had supposed that the former opinion delivered in these cases upon this point had been concurred in by four judges. But in this he was mistaken.

The opinion was concurred in by one judge. He was still of opinion that the construction then given was correct.

He understood the expression *en sortant*, in the arrete, as confining the case of vessels coming out, to vessels taken in the act of coming out. If it included vessels captured on the return voyage, he should concur in the opinion now delivered.

However, the principle of that case, (Rose *v.* Himely,) is now overruled.

Judgment affirmed.[1]

7 C. 1, 423; 12 P. 657.

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[1] TODD, J., stated that in the case of Rose *v.* Himely, at February term, 1808, he concurred in the opinion with Judge Johnson.

Harper stated that one of the judges of the court below had doubted whether, when a case is reversed upon a bill of exceptions and remanded, the court below ought to grant a new trial.

MARSHALL, C. J. If it be upon a special verdict, or case agreed, the court above will proceed to give judgment. But when a verdict in favor of a plaintiff is reversed, on a bill of exceptions to instructions given to the jury, there must be a new trial awarded by the court below.

* SMITH *v.* THE STATE OF MARYLAND, at the instance and [* 286] for the use of CARROLL and MACCUBBIN.

6 C. 286.

The construction of a treaty is drawn in question when the inquiry is whether, under the laws of a State, such a title existed as the treaty protects, although the only difficulty of that inquiry consists in the interpretation of the state laws and their application to the case.

In such a case the supreme court has jurisdiction under the 25th section of the Judiciary Act (1 Stats. at Large, 85.)

By the confiscation acts of Maryland, equitable interests were completely devested, by operation of law, without office found.

ERROR to the court of appeals of the State of Maryland, in a suit in chancery, brought at the instance of Carroll & Maccubbin, in the name of the State, against Smith, to compel him to convey to them the legal title to certain lands, held by him as trustee for Ann Ottey, a British subject. The complainants claimed under the State, as owners of the equitable fee, alleging that it had passed to them under the confiscation acts of the State. The defendant insisted that the title of the *cestui que trust* had not been devested at the date of the treaty of peace, and was protected by that treaty. The court of appeals decreed in favor of the complainants.

Johnson and *Jones*, for the plaintiff.

Ridgely and *Harper*, for the defendants.

* WASHINGTON, J.,[1] delivered the opinion of the court, as [* 304] follows:

This cause comes before the court upon a writ of error to the court of appeals of the State of Maryland; and the first question is, has the supreme court of the United States appellate jurisdiction in a case like the present? It is contended, by the defendants in error, that the question involved in the cause turns exclusively upon the construction of the confiscation laws of the State of Maryland, passed prior to the treaty of peace,[2] and that no question, relative to the construction of that treaty, did or could occur. That the only point in

[1] The Chief Justice did not sit in this cause. The judges present were Washington, Johnson, Livingston, and Todd.

[2] 8 Stats. at Large, 80.

dispute was, whether the confiscation of the lands in controversy was complete, or not, by the mere operation of those laws, without any further act to be done. If the former, it was admitted, on the one side, that the right of Ann Ottey, the British subject, was not saved or protected by the treaty; if the latter, then it was agreed, on the other, that it was protected, and that no proceedings subsequent to the treaty, in order to perfect the confiscation, could be supported.

This argument proves nothing more than that the whole difficulty in this case depends upon that part of it which involves the construction of certain state laws, and that the operation and effect of the treaty, which constitues the residue of the case, is obvious so soon as that construction is settled. But still the question recurs, is this a case where the construction of any clause in a treaty was drawn in question in the state court, and where the decision was against the title set up under such treaty? The only title asserted by the defendants in error, to the land in dispute, is founded upon an alleged confiscation of them by the State of Maryland, and a conveyance to them of the right thus acquired by the State.

[* 305] The title set up by the *plaintiffs in error, for Ann Ottey, and the only one which could possibly resist that claimed by the grantees of the State, is under the treaty of peace; the 6th article of which protects her rights, provided the confiscation, by the laws of the State, was not complete prior to the treaty. The point to be decided was and is, whether this be a case of future confiscation, within the meaning of the 6th article of that treaty; and, in order to arrive at a correct result in the decision of that point, it became necessary, in the state court, and will be necessary in this, to inquire whether the confiscation, declared by the state laws, was final and complete, at the time the treaty was made, or not? The construction of those laws, then, is only a step in the cause leading to the construction and meaning of this article of the treaty; and it is perfectly immaterial to the point of jurisdiction, that the first part of the way is the most difficult to explore. Although the defendant's counsel admit, and the supreme court of the State may, in this particular case, have decided, that, where the confiscation is not complete before the treaty, the estate attempted to be confiscated is protected by the treaty, still, if, according to the true construction of the state laws, this court should be of opinion that the acts of confiscation left something to be done necessary to the perfection of the title claimed under them, which was not done at the time the treaty was made, we must say that, in this case, the construction of the treaty was drawn in question, and that the decision of the state court was against the right set up, under the treaty, by one of the parties.

This leads to the consideration of the merits of the cause, which depend upon the question before stated, namely, whether the confiscation of the lands in question was so far complete by the laws referred to, that the title and estate of Ann Ottey was devested out of her and vested in the State, prior to the treaty of peace? This must depend upon the true construction of the acts passed in the year 1780, chapters 45 and 49, as it is not pretended that any proceedings were instituted in the nature of an office, to complete the forfeiture *of these lands, upon the grounds of alienage or otherwise. [* 306]

The first law declares generally that "all property within this State belonging to British subjects, debts only excepted, shall be seized, and is hereby confiscated to the use of this State. Anticipating, as it would seem, that questions might arise, after peace, in respect to lands not proceeded against according to the rules of the common law, the legislature, in the same session, passed a second law, appointing certain commissioners, by name, to preserve all British property seized and confiscated by the former law, and declaring the said commissioners to be in the full and actual seizin and possession of all British property seized and confiscated by the said act, without any office found, entry, or other act to be done, with power to the said commissioners, to appoint fit persons to enter and take possession of said property, for the purpose of its preservation.

It would seem difficult to draught a law more completely operative to devest the whole estate of the former owner, and to vest it in the State. The arguments against giving to these laws such an effect are, that the expressions used in these laws do not import a confiscation of merely equitable estates, and that no estates were intended to be confiscated, but such as were discovered and seized into the hands of the State, prior to the treaty.

It is true that the word property, used in both laws, means the thing itself, intended to be affected by them, whether it were land or personal property; but then it is equally clear that the thing itself, whatever it might be, ceased, by the operation of these laws, to belong to the British subject, and became vested in the commissioners, for the use of the State. The *cestui que trust*, though not in possession of the property, was, nevertheless, the real owner of it, and, if the property or the thing itself had come into the actual possession of the commissioners, who would have held it to the use of the State, it would seem difficult to maintain the position, that a scintilla of interest *or estate remained, for an instant after- [* 307]
wards, in the former owner.

But no act of the commissioners was necessary in order to obtain seizin of the land, to support the use thus transferred from Ann Ot-

tey to the State. No seizure was necessary. The second law considers that all property belonging to British subjects was, by the mere operation of the first law, seized and confiscated; and declares that the commissioners were then in the full and actual seizin and possession of the property, so seized and confiscated by the first law, though no entry or other act had or should be made or done.

Being thus in the actual seizin, under the second law, which seizin had been declared, by the first law, to enure to the use of the State, it is perfectly immaterial at what time the right of the State to the lands now in controversy, thus completed prior to the treaty, was discovered, or at what time actual seizin and possession was obtained. From the time that the second law came into operation, the possession of the trustees of Ann Ottey either ceased to be legal, or it was to be considered as the possession of the commissioners to the new use which had been declared by law. The present suit is between persons claiming under the State, and others who either held the lands wrongfully, or for the use of the State, and it is, in no respect, necessary to the perfection of the change of property produced by the laws of confiscation.

Judgment affirmed, with costs.

7 C. 603; 1 W. 303; 8 W. 464; 4 P. 410; 10 P. 368; 11 H. 529; 12 H. 111.

DUROUSSEAU, and others, *v.* THE UNITED STATES.

6 C. 307.

The affirmative description of the appellate power of the supreme court, contained in the Judiciary Act, (1 Stats. at Large, 73,) implies a negative on the exercise of such appellate power as is not comprehended within it.

But it is not necessary the appellate jurisdiction should be expressly given by an act of congress; it is enough, if an intent to allow it to exist, under the constitution, in a particular case, can be ascertained.

Under the act of March 26, 1804, (2 Stats. at Large, 285, s. 8,) this court had appellate jurisdiction, by writ of error to the district court of the territory of Orleans.

The act of March 12, 1808, (2 Stats. at Large, 473,) does not inflict a forfeiture, if the vessel was forced by stress of weather into an interdicted port.

ERROR to the district court of the United States for the territory of Orleans. Suits were brought by the United States in that court, upon bonds given under the act of December 22, 1807, (2 Stats. at Large, 451,) amended by the act of March 12, 1808, (2 Stats. at Large, 473.) The question was raised by a demurrer, whether put-

ting away for an interdicted port necessarily, for the preservation of the property and lives on board, and landing the cargo there under the compulsion of the local government, was a breach of the bond. The district court decided in favor of the United States, and the defendants brought error. The attorney-general, (*Rodney,*) and *Jones*, moved to dismiss the writs for want of jurisdiction.

E. Livingston, contrà.

* MARSHALL, C. J., delivered the opinion of the court, upon [*312] the question of jurisdiction, as follows:

This is the first of several writs of error to sundry judgments rendered by the court of the United States for the territory of Orleans.

The attorney-general having moved to dismiss them, because no writ of error lies from this court to that in any case, or, if in any case, not in such a case as this; the jurisdiction of this court becomes the first subject for consideration.

The act[1] erecting Louisiana into two territories establishes a district court in the territory of Orleans, consisting of one judge who "shall, in all things, have and exercise the same jurisdiction and powers which are, by law, given to, or may be exercised by, the judge of Kentucky district."

On the part of the United States it is contended, that this description of the jurisdiction of the court of New Orleans does not imply a power of revision in this court similar to that which might have been exercised over the judgments of the district court of Kentucky; or, if it does, that a writ of error could not have been sustained to a judgment rendered by the district court of Kentucky, in such a case as this.

On the part of the plaintiffs it is contended, that this court possesses a constitutional power to revise and correct the judgments of inferior courts; or, if not so, that such a power is implied in the act by which the * court of Orleans is created, taken in [*313] connection with the Judicial Act; and that a writ of error would lie to a judgment rendered by the court for the district of Kentucky, in such a case as this.

Every question originating in the Constitution of the United States claims, and will receive, the most serious consideration of this court.

The third article of that instrument commences with organizing the judicial department. It consists of one supreme court, and of such inferior courts as congress shall, from time to time, ordain and establish. In these courts is vested the judicial power of the United States.

[1] 2 Stats. at Large, 283.

The first clause of the second section enumerates the cases to which the power shall extend.

The second clause of the same section distributes the powers previously described. In some few cases the supreme court possesses original jurisdiction. The constitution then proceeds thus: "In all the other cases before mentioned the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the congress shall make."

It is contended that the words of the constitution vest an appellate jurisdiction in this court, which extends to every case not excepted by congress; and that if the court had been created without any express definition or limitation of its powers, a full and complete appellate jurisdiction would have vested in it, which must have been exercised in all cases whatever.

The force of this argument is perceived and admitted. Had the Judicial Act created the supreme court, without defining or limiting its jurisdiction, it must have been considered as possessing all the jurisdiction which the constitution assigns to it. The legislature would have exercised the power it possessed of creating a [*314] supreme court as ordained by the constitution; *and, in omitting to exercise the right of excepting from its constitutional powers, would have necessarily left those powers undiminished. The appellate powers of this court are not given by the Judicial Act. They are given by the constitution. But they are limited and regulated by the Judicial Act, and by such other acts as have been passed on the subject.

When the first legislature of the Union proceeded to carry the third article of the constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions to the appellate jurisdiction of the supreme court. They have not, indeed, made these exceptions in express terms. They have not declared that the appellate power of the court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent.

It is upon this principle that the court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers.

Thus, a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of $2,000. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value, and implies negative words.

This restriction, however, being implied by the court, * and [*315] that implication being founded on the manifest intent of the legislature, can be made only where that manifest intent appears. It ought not to be made for the purpose of defeating the intent of the legislature.

Having made these observations on the constitution, the court will proceed to consider the acts on which its jurisdiction, in the present case, depends; and, first, to inquire whether it could take cognizance of this case had the judgment been rendered by the district court of Kentucky.

The ninth section of the Judicial Act describes the jurisdiction of the district courts.

The tenth section declares that the district court of Kentucky, "besides the jurisdiction aforesaid," shall exercise jurisdiction over all other causes, except appeal and writs of error, which are made cognizable in a circuit court, and shall proceed therein in the same manner as a circuit court; "and writs of error and appeals shall lie from decisions therein to the supreme court, in the same causes as from a circuit court to the supreme court, and under the same regulations."

It is contended that this suit, which is an action on a bond conditioned to be void on the relanding of goods within the United States, is one of which the district courts have exclusive jurisdiction, and that a writ of error would not lie to a judgment given in such a case.

This court does not concur with the attorney-general in the opinion that a circuit court has no original jurisdiction in a case of this description. But it is unnecessary to say anything on this point, because it is deemed clear that a writ of error is given in the case, however this question might be decided.

It would be difficult to conceive an intention in the legislature to discriminate between judgments rendered by the district court of Kentucky, while exercising the powers of a district court, and those rendered by the same court while exercising circuit powers, when it is * demonstrated that the legislature makes no dis- [*316] tinction in the cases from their nature and character. Causes of which the district courts have exclusive original jurisdiction are car-

ried into the circuit courts, and then become the objects of the appellate jurisdiction of this court. It would be strange if, in a case where the powers of the two courts are united in one court, from whose judgments an appeal lies, causes, of which the district courts have exclusive original jurisdiction, should be excepted from the operation of the appellate power. It would require plain words to establish this construction.

But the court is of opinion that the words import no such meaning. The construction given by the attorney-general to the word "therein," as used in the last instance, in the clause of the tenth section, which has been cited, is too restricted. If, by force of this word, appeals were given only in those causes in which the district court acted as a circuit court exercising its original jurisdiction, the legislature would not have added the words, "in the same causes as from a circuit court." This addition, if not an absolute repetition, could only serve to create doubt where no doubt would otherwise exist.

The plain meaning of these words is, that wherever the district court decides a cause which, if decided in a circuit court, either in an original suit, or on an appeal, would be subject to a writ of error from the supreme court, the judgment of the district court shall, in like manner, be subject to a writ of error.

This construction is, if possible, rendered still more obvious by the subsequent part of the same section, which describes the jurisdiction of the district court of Maine in the same terms. Apply the restricted interpretation to the word, "therein," in that instance, and the circuit court of Massachusetts would possess jurisdiction over causes in which the district court of Maine acted as a circuit court; and not over those in which it acted as a district court; a construction which is certainly not to be tolerated.

[*317] *Had this judgment been rendered by the district court of Kentucky, the jurisdiction of this court would have been perfectly clear.

The remaining question admits of more doubt.

It is said that the words used in the law creating the court of Orleans, describe the jurisdiction and powers of that court, not of this, and that they give no express jurisdiction to this court. Hence it is inferred, with considerable strength of reasoning, that no jurisdiction exists.

If the question depended singly upon the reference made in the law creating the court for the territory of Orleans, to the court of Kentucky, the correctness of this reasoning would, perhaps, be conceded. It would be found difficult to maintain the proposition, that investing the judge of the territory of Orleans with the same juris-

diction and powers which were exercised by the judge of Kentucky, imposed upon that jurisdiction the same restrictions arising from the power of a superior court, as were imposed on the court of Kentucky.

But the question does not depend singly on this reference; it is influenced by other very essential considerations.

Previous to the extension of the circuit system to the western States, district courts were erected in the States of Tennessee and Ohio, and their powers were described in the same terms with those which describe the powers of the court of Orleans. The same reference is made to the district court of Kentucky. Under these laws this court has taken jurisdiction of a cause brought by writ of error from Tennessee. It is true the question was not moved, and, consequently, still remains open. But can it be conceived to have been the intention of the legislature to except, from the appellate jurisdiction of the supreme court, all the causes decided in the western country, except those decided in Kentucky? Can such an intention * be thought possible? Ought it to be inferred [*318] from ambiguous phrases?

The constitution here becomes all important. The constitution and the laws are to be construed together. It is to be recollected that the appellate powers of the supreme court are defined in the constitution, subject to such exceptions as congress may make. Congress has not expressly made any exceptions; but they are implied from the intent manifested by the affirmative description of its powers. It would be repugnant to every principle of sound construction, to imply an exception against the intent.

This question does not rest on the same principles as if there had been an express exception to the jurisdiction of this court, and its power, in this case, was to be implied from the intent of the legislature. The exception is to be implied from the intent, and there is, consequently, a much more liberal operation to be given to the words by which the courts of the western country have been created.

It is believed to be the true intent of the legislature to place those courts precisely on the footing of the court of Kentucky, in every respect, and to subject their judgments, in the same manner, to the revision of the supreme court. Otherwise the court of Orleans would, in fact, be a supreme court. It would possess greater and less restricted powers than the court of Kentucky, which is, in terms, an inferior court.

The question of jurisdiction being decided, it was stated by the counsel that the seven following cases on the docket, namely, the cases of Bera and others, Connelly and others, Castries and others, Gibbs and others, Childs and others, Clay and others, and Keene

and others, against the United States, all from New Orleans, stood upon the same pleas of unavoidable accident; excepting that in the cases of Bera and others, and Connelly and others, the accident was capture by the British, and prevention by superior force
[*319] from relanding the goods * in the United States. The bond in Bera's case was dated the 21st of March, 1808. The condition was the same as in the case of Durousseau.

[*322] * MARSHALL, C. J., delivered an opinion, to the following effect:

The court considered many of the points in these cases while they had the case of The United States *v.* Hull and Worth,[1] under consideration; and upon the present argument I understand it to be the unanimous opinion of the court, that the law is for the plaintiffs in error, in all these cases. I cannot precisely say what are the grounds of that opinion; I can only state the reasons which have prevailed in my own mind.

It is true, as contended on the part of the United States, that the legislature is competent to declare what evidence shall be received of the facts offered in excuse for a violation of the letter of a statute.

I also agree with the counsel for the United States, that the words of the statute, "loss by sea or other unavoidable accident," mean loss by sea, or loss by other unavoidable accident.

But the question is, what sort of loss is meant? It must be such a loss as necessarily prevents the party from complying with the condition of the bond. It is not necessary that it should be an actual destruction of the property, but such a loss only as necessarily prevents the relanding of the goods.

This statute is not like that upon which the prosecution was founded in the case cited from Bunbury. Our statute does not require evidence that the goods have "perished in the sea." It only requires proof of such a loss, by an unavoidable accident,
[*323] as prevents the * relanding of the cargo, according to the condition of the bond. When the property is captured, and taken away by the superior force of a foreign power, so as to prevent the relanding, it is lost within the meaning of the statute, by an unavoidable accident, although the owner may have received a compensation for it.

JOHNSON, J. I agree with the court in the result of the opinion, but not altogether upon the grounds stated by the chief justice. If the

[1] 6 C. 171.

act in question will admit of two constructions, that should be adopted which is most consonant with the general principles of reason and justice. I cannot suppose that the legislature meant to do an unjust, or an unreasonable act. No man can be bound to do impossibilities. The legislature must be understood to mean that the party should be excused by showing the occurrence of such circumstances as rendered it impossible to perform the condition of the bond. To make his liability depend upon the mere point of ultimate loss or gain would be unreasonable in the extreme.

LIVINGSTON, J. I concur in the reversal of these judgments, but not in the construction which the chief justice puts upon the 3d section of the act of March, 1808.

If the relanding of the cargo in the United States had been prevented by any unavoidable accident whatever, although the goods themselves were not lost, it would, in my opinion, have furnished a good defence to this suit.

If the Spanish government had forced a sale of the property, and the proceeds had actually come to the hands of the owners, it would have made no difference. Loss by sea is one excuse; unavoidable accident, whether followed by loss, or not, is another.

*WASHINGTON and TODD, J., agreed in opinion with [*324] Judge LIVINGSTON.

Judgment reversed.

5 P. 190; 14 P. 599; 14 H. 103.

TYLER and others *v.* TUEL.

6 C. 324.

Under the act of February 21, 1793, (1 Stats. at Large, 318,) the assignee of part of a patent right, can not maintain an action at law.

CERTIFICATE of a division of opinion of the judges of the circuit court of the United States for the district of Vermont, on a motion to arrest the judgment, in an action on the case for the violation of the exclusive right under letters-patent, bearing date February 20, 1800. The plaintiffs declared as assignees, and alleged an assignment, by deed, of all the right of the patentee, "excepting in the

counties of Chittenden, &c., in the State of Vermont." The judges were divided in opinion upon the question, "whether the plaintiffs, by their own showing, are legal assignees to maintain this action."

Hubbard, for the defendant.

Rodney, attorney-general, for the plaintiffs.

[*326] *On a subsequent day the court directed the following opinion to be certified to the circuit court for the district of Vermont, namely:

[*327] *It is the opinion of the court that the plaintiffs, by their own showing, are not legal assignees to maintain this action, in their own names, and that the judgment of the circuit court be arrested.

The Schooner Juliana *v.* The United States; and The Ship Alligator *v.* The United States.

6 C. 327.

These were appeals from sentences of condemnation by the circuit court of the United States for the district of Maryland, for violations of the Embargo Act of January 9, 1808, (2 Stats. at Large, 453.) The charge was, that goods were taken from The Juliana, and put on board The Alligator, in the port of Baltimore; but there was no averment that it was intended to export them.

The attorney-general abandoned the prosecution, and the sentences were reversed, no opinion being given.

*The Schooner Rachel *v.* The United States. [*329]

6 C. 329.

No sentence of condemnation can be affirmed if the law under which the forfeiture accrued has expired, although a condemnation and sale had taken place, and the money had been paid over to the United States, before the expiration of the law.

This court in reversing the sentence, will not order the money to be repaid, but will award restitution of the property, as if no sale had been made.

This was an appeal from the sentence of the district court of the United States for the district of Orleans, which condemned the schooner Rachel for having traded with certain prohibited ports of St. Domingo, contrary to the act of congress, (2 Stats. at Large, 351, 421.)

The sentence of condemnation was passed, and the vessel sold, and the proceeds paid over to the United States, while the act was in force. The act had since expired. It was a case within the principle decided at last term, in the case of Yeaton and Young *v.* The United States, but it having been made a question whether the sale and payment over of the money did not prevent the operation of that principle, and there being also a question of jurisdiction, the cause stood over to this term for consideration.

The general question of jurisdiction of that court having been settled at this term in the case of Sere and Laralde *v.* Pitot and others, and the fact of the sale and payment over of the money being admitted,

*Martin and *P. B. Key*, for the claimants, prayed the [*330] court to direct that the proceeds should be paid over to the claimants.

But the court said that was a matter to be left to the consideration of the court below. This court will only make a general order for restitution of the property condemned.

3 H. 534.

The Brigantine Amiable Lucy v. The United States.

6 C. 330.

The act of congress of the 28th of February, 1803, to prevent the importation of certain persons into certain States, where, by the laws thereof, their admission is prohibited, is not in force in the territory of Orleans.

Error to the district court of the United States for the district of Orleans, to reverse the sentence of that court which condemned the brigantine Lucy, for importing a slave from the West Indies, contrary to the act of congress of the 28th of February, 1803, entitled "An act to prevent the importation of certain persons into certain States, where, by the laws thereof, their admission is prohibited." (2 Stats. at Large, 205.)

[*331] [*332] It was admitted that the territorial legislature had never passed any law prohibiting the importation of slaves.

It was contended by *Rodney*, attorney-general, that as congress, by the act of the 26th of March, 1804,[1] prohibited the importation of slaves from foreign countries into the territory of Orleans, and as the same act expressly extends to the territory the act of the 28th of February, 1803, which forfeits the ship which imports a slave into a State where such importation is prohibited, the evident meaning and intention of congress was, to declare that the vessel should be forfeited which should import a slave into the territory of Orleans.

E. Livingston, contrà, contended, that inasmuch as the territorial legislature of Orleans had never prohibited such importation, the act of the 28th of February, 1803, did not apply. If the territory is to be assimilated to a State, so as to bring the case within the spirit of the law, yet, there must have been a prohibition by the territorial legislature, to make it a parallel case.

And of that opinion was this court, the case having been submitted without argument.

Sentence reversed.

[1] 2 Stats. at Large, 283.

Serre and Laralde v. Pitot and others.

6 C. 332.

A general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued in those courts.

The citizens of the territory of Orleans may sue and be sued in the district court of that territory in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky.

Error to the district court of the United States for the district of Orleans, in a suit in equity, in which Serè & Laralde were complainants, against Pitot and others, defendants.

The complainants stated that they were aliens, and syndics of the creditors of the joint concern of Dumas & Janeau, Pierre Lavergne and Joseph Faurie; that Faurie died insolvent; that Dumas & Janeau were *also insolvent, and made a surrender of all [*333] their effects to their creditors, and that Lavergne acknowledged himself to be unable to pay the debts of the joint concern: that the joint concern, as well as the individual members, being insolvent, "application was made by their creditors to the superior court of the territory of Orleans, and such proceedings were thereupon had that, according to the laws of the said territory, the complainants were, at a meeting of the creditors of the said partnership, duly nominated syndics for the said creditors, and, by the laws of the said territory, all the estate, rights, and credits of the said partnership were vested in the complainants." They also stated that the defendants were citizens of the United States.

The defendants pleaded to the jurisdiction, and the court below allowed the plea.

E. Livingston, for the plaintiffs in error.

Harper, contrà.

*Marshall, C. J., delivered the opinion of the court, as [*334] follows, namely:

This suit was brought in the court of the United States for the Orleans territory, by the plaintiffs, who are aliens, and syndics or assignees of a trading company composed of citizens of that territory, who have become insolvent. The defendants are citizens of the territory, and have pleaded to the jurisdiction of the court. Their plea was sustained, and the cause now comes on to be heard on a writ of error to that judgment.

Two objections are made to the jurisdiction of the district court.

1. That the suit is brought by the assignees of a *chose in action*, in a case where it could not have been prosecuted, if no assignment had been made.

2. That the district court cannot entertain jurisdiction, because the defendants are not citizens of any State.

The first objection rests on the 11th section of the Judicial Act,[1] which declares "that no district or circuit court shall have [*335] cognizance of any suit to recover *the contents of any promissory note, or other *chose in action*, in favor of an assignee, unless a suit might have been prosecuted in such court, to recover the said contents, if no assignment had been made."

The plaintiffs are admitted to be the assignees of a *chose in action*, but it is contended that they are not within the meaning of the provision which has been cited, because this is a suit for cash, bills, and notes, generally, by persons to whom the law transfers them, and not by such an assignee as is contemplated in the Judicial Act. The words of the act are said to apply obviously to assignments made by the party himself, on an actual note, or other *chose in action*, assignable by the proprietor thereof, and that the word "contents" cannot, by any fair construction, be applied to accounts or unliquidated claims. Apprehensions, it is said, were entertained that fictitious assignments might be made to give jurisdiction to a federal court, and, to guard against this mischief, every case of an assignment by a party holding transferable paper, was excepted from the jurisdiction of the federal courts, unless the original holder might have sued in them.

Without doubt, assignable paper, being the *chose in action* most usually transferred, was in the mind of the legislature when the law was framed; and the words of the provision are therefore best adapted to that class of assignments. But there is no reason to believe that the legislature were not equally disposed to except from the jurisdiction of the federal courts those who could sue in virtue of equitable assignments, and those who could sue in virtue of legal assignments. The assignee of all the open accounts of a merchant might, under certain circumstances, be permitted to sue in equity, in his own name, and there would be as much reason to exclude him from the federal courts, as to exclude the same person, when the assignee of a particular note. The term "other *chose in action*" is broad enough to comprehend either case; and the word "contents," is too ambiguous in its import, to restrain that general term. The "contents"

[1] 1 Stats. at Large, 78.

of a note are the sum it shows to be due; *and the same [*336] may, without much violence to language, be said of an account.

The circumstance, that the assignment was made by operation of law, and not by the act of the party, might probably take the case out of the policy of the act, but not out of its letter and meaning. The legislature has made no exception in favor of assignments so made. It is still a suit to recover a *chose in action* in favor of an assignee, which suit could not have been prosecuted if no assignment had been made; and is therefore within the very terms of the law. The case decided in 4 Cranch 306, was on a suit brought by an administrator, and a residuary legatee, who were both aliens. The representatives of a deceased person are not usually designated by the term "assignees," and are, therefore, not within the words of the act. That case, therefore, is not deemed a full precedent for this.

It is the opinion of the court that the plaintiffs had no right to maintain this suit in the district court against a citizen of the Orleans territory, they being the assignees of persons who were also citizens of that territory.

It is of so much importance to the people of Orleans to decide on the second objection, that the court will proceed to consider that likewise.

Whether the citizens of the territory of Orleans are to be considered as the citizens of a State, within the meaning of the constitution, is a question of some difficulty, which would be decided, should one of them sue in any of the circuit courts of the United States. The present inquiry is limited to a suit brought by or against a citizen of the territory, in the district court of Orleans.

The power of governing and of legislating for a territory is the inevitable consequence of the right to acquire and to hold territory. Could this position be contested, the constitution of the United States declares *that "congress shall have power to [*337] dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." Accordingly, we find congress possessing and exercising the absolute and undisputed power of governing and legislating for the territory of Orleans. Congress has given them a legislative, an executive, and a judiciary, with such powers as it has been their will to assign to those departments respectively.

The court possesses the same jurisdiction which was possessed by the court of Kentucky. In the court of Kentucky, a citizen of Kentucky may sue or be sued. But it is said that this privilege is not imparted to a citizen of Orleans, because he is not a citizen of a

State. But this objection is founded on the idea that the constitution restrains congress from giving the court of the territory jurisdiction over a case brought by or against a citizen of the territory. This idea is most clearly not to be sustained, and, of consequence, that court must be considered as having such jurisdiction as congress intended to give it.

Let us inquire what would be the jurisdiction of the court, on this restricted construction.

It would have no jurisdiction over a suit brought by or against a citizen of the territory, although an alien, or a citizen of another State might be a party.

It would have no jurisdiction over a suit brought by a citizen of one State, against a citizen of another State, because neither party would be a citizen of the "State" in which the court sat. Of what civil causes, then, between private individuals, would it have jurisdiction? Only of suits between an alien and a citizen of another State who should be found in Orleans. Can this be presumed to have been the intention of the legislature in giving the territory a court possessing the same jurisdiction and power with that of Kentucky?

[* 338] The principal motive for giving federal courts jurisdiction, is to secure aliens and citizens of other * States from local prejudices. Yet all who could be affected by them are, by this construction, excluded from those courts. There could scarcely ever be a civil action between individuals of which the court could take cognizance; and if such a case should arise, it would be one in which no prejudice is to be apprehended.

It is the unanimous opinion of the court that, by a fair construction of the act, the citizens of the territory of Orleans may sue and be sued in that court in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky.

Judgment affirmed, with costs.

19 H. 393.

The Maryland Insurance Company v. Ruden's Administrator.

6 C. 338.

What is reasonable time for abandonment is a question for the jury to decide under the direction of a court.

The operation of a concealment, on the policy, depends on its materiality to the risk; and this materiality is a subject for the consideration of a jury.

A bill of lading, stating the property to belong to A and B, is not conclusive evidence, and does not estop A from showing the property to belong to another.

ERROR to the circuit court for the district of Maryland in an action of covenant upon a policy of insurance upon the cargo of the brig Sally, at and from Surinam to New York.

There was no warranty as to the character of the property.

Upon the trial below, the plaintiffs in error took three bills of exception; and the verdict and judgment being against them, they brought their writ of error.

The case is fully stated by the chief justice in delivering the opinion of the court.

The cause was argued by *Winder* and *Martin*, for the plaintiffs in error, and by *Harper*, for the defendant.

March 17. MARSHALL, C. J., delivered the opinion of the court, as follows:

This case depends on the correctness of the circuit court [*339] in giving some opinions, and refusing others, to which exceptions have been taken.

It appears that, on the 22d of October, the assured received notice of the capture of the vessel insured, and that, on the 25th, he wrote a letter abandoning to the underwriters, which letter was received in course of the mail, and immediately acted upon. Some reasons were assigned, by the plaintiff below, for not having abandoned more immediately after receiving notice of the capture, and the defendant below moved the court to instruct the jury that the assured did not elect to abandon in reasonable time. To the refusal of the court to give this instruction the first exception is taken.

It has been repeatedly declared by this court that what is reasonable time for abandonment is a question compounded of fact and law, of which the jury must judge under the direction of a court. It does not appear that the court below erred in refusing, in this case, to give the instruction required.

The insured was a subject of a belligerent power, but had resided four years in the United States. His letter, representing the risk, was laid before the jury, and a good deal of testimony was taken to prove that a belligerent not named in the representation was interested in the cargo. Some counter testimony was also introduced by the assured. Whereupon the counsel for the underwriters moved the court to instruct the jury that, if they believed the facts stated by him, there was such a concealment as, in contemplation of law, vitiated the policy. This direction, the court refused to give, but did direct the jury that, if they should be of opinion that any circumstances were

stated by Ruden, or his agent, or that any circumstances were suppressed by either of them, which, in the opinion of the jury, would increase the risk, then the plaintiff cannot recover.

To this opinion an exception was taken.

It is well settled that the operation of any concealment on [* 340] the policy depends on its materiality to the * risk, and this court has decided that this materiality is a subject for the consideration of a jury. Consequently, the court below did right in leaving it to them.

The counsel for the underwriters then gave some very strong evidence to prove that the property insured was not the sole property of the assured, but was property in which another person held a joint interest. Some counter testimony was adduced; on which the defendant below moved the court to direct the jury to find that the property was not the sole property of Ruden, but the joint property of Ruden and another.

This direction also the court refused to give, and did direct the jury that it was their peculiar province to determine the fact whether Ruden was the sole owner of the property, or not; and to this opinion an exception was taken.

It is contended by the plaintiffs in error that the testimony offered by them, among which was the bill of lading stating the property to belong to Ruden and another, was such as absolutely to conclude him, and estop him from denying that another was concerned in the cargo.

The court is not of this opinion. The covering of property does not conclude the person interested, so as to estop him from proving the truth of the case. There is the less reason for that effect being given to these papers in this case, because the letter to the underwriters indicated that the cargo might be shipped in the name of other persons.

If the insured was not absolutely estopped, the court did not err in permitting the jury to weigh his testimony. They had a right to weigh it, and to decide to whom the property belonged. If their verdict was against evidence, the only remedy was a new trial to be granted by the court in which the verdict was found.

There is no error, and the judgment is to be affirmed, with costs.

1 P. 170; 8 H. 234.

At a supreme court of the United States, begun and holden at the capitol, in the city of Washington, on the first Monday, being the 4th day of February, in the year of our Lord, one thousand eight hundred and eleven.

PRESENT,

Hon. JOHN MARSHALL, Chief Justice.
Hon. BUSHROD. WASHINGTON, and
Hon. BROCKHOLST LIVINGSTON, } Associate Justices.

There not being a sufficient number of justices to form a quorum, the court is adjourned till to-morrow morning, 11 o'clock; and there not appearing a sufficient number of justices, to form a quorum, for ten days, the court was adjourned by the above-named justices, *de die in diem*, for ten days, when the court was adjourned to the court in course, agreeably to the act of congress, in such case made and provided.

DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES.

FEBRUARY TERM, 1812.

JUDGES DURING THE TERM OF THESE REPORTS.

HON. JOHN MARSHALL, CHIEF JUSTICE.
HON. BUSHROD WASHINGTON,
HON. WILLIAM JOHNSON,
HON. BROCKHOLST LIVINGSTON,
HON. THOMAS TODD,
HON. GABRIEL DUVALL, AND
HON. JOSEPH STORY,
} ASSOCIATE JUSTICES.

[Judges present. — WASHINGTON, LIVINGSTON, TODD, DUVALL, and STORY.]

The Chief Justice did not attend until Thursday, February 13. He received an injury by the overseting of the stage-coach on his journey from Richmond.

HUDSON and SMITH *v.* GUESTIER.

7 C. 1.

This court will not rehear a cause after the term in which it was decided.

ON the first day of the term, *Harper* moved for, and obtained a rule to show cause why this case, which was decided at February term, 1810, should not be reheard. The motion was grounded upon a statement of facts, which was filed.

March 12th. When this rule was mentioned again by *Harper*, he was informed

By the COURT, that the case could not be reheard after the term in which it had been decided.

[*2] *FITZSIMMONS and others *v.* OGDEN and others.

7 C. 2.

He who has equal equity, may acquire the legal estate, if he can, so as to protect his equity.

THIS was an appeal from a decree of the circuit court of the United States for the district of New York.

The material facts as stated in the opinion of the court are as follows: —

For the purpose of securing certain of his creditors, Robert Morris, on the 14th of February, 1798, conveyed to the appellants, as trustees for those creditors, a certain tract of land lying in Ontario county, in the State of New York, containing 500,000 acres, described by certain bounds. Previous to this, he had made conveyances to sundry persons of considerable portions of this tract, and amongst others to the defendants, S. Ogden, J. B. Church, and to G. Cottringer, under whom the heirs of Sir William Pulteney claims, of which the appellants had full notice. He had also, by different conveyances, granted to the Holland company more than three millions of acres of land, purchased, (as this tract of 500,000 acres had been,) from the State of Massachusetts, all in the same county and adjoining the land in question.

On the 8th of June, 1797, a judgment, at the suit of Talbot and Allum against Robert Morris, was docketed in the supreme court of the State of New York; which, being prior in date to the conveyance made to the appellants, bound all the land which passed by it to the appellants. The bill states that Robert Morris, being confined in the jail at Philadelphia, in order to prevent any improper use [*3] *from being made of the above judgment, and on condition that the title to the land conveyed to the trustees should in nowise be impaired by it, procured Gouverneur Morris to advance the money for such judgment, from motives of friendship — that the said judgment was assigned to Adam Hoops, the mutual friend and agent of the parties, which was done to prevent it from being used injuriously against the trustees and the creditors for whom they acted, and also to preserve to Robert Morris the right of redemption in 1,500,000 acres which he had conveyed to the Holland company, in the nature of a mortgage as he supposed. That A. Hoops afterwards assigned the said judgment to Gouverneur Morris, and on the 16th of September, 1799, Robert Morris confirmed the said trust deed (of which it is

worthy of remark, no mention had been made in the previous parts of the bill) and further agreed that any other land he might have in that county, which had not been previously conveyed, should be applied to pay that judgment in the first place, and the said last mentioned lands were to be sold upon an execution and to be purchased by A. Hoops under Talbot and Allum's judgment for the trustees, to which G. Morris assented, the trustees agreeing to mortgage the land to be purchased, to repay G. Morris the sum advanced for the purchase of the judgment.

It appears by the evidence, that, previous to the promise thus charged in the bill to have been made by G. Morris, to R. Morris, the judgment of Talbot and Allum had been conditionally purchased by R. Morris, jun., one of the appellants, avowedly for his individual use, from Cotes, Titford, and Brooks, who then held it by assignment. That when this purpose was effected, it was agreed that the assignment should be made to A. Hoops, though in reality for the use of R. Morris, jun., and should remain in the hands of a third person as an escrow to take effect on the payment of the note given by the said R. Morris jun., for the purchase of the judgment, and that the same should belong to Thomas Cooper, who indorsed the said note, in case he should be compelled to discharge the same.

R. Morris, about the time when this note would become due, * found himself unable to take it up, and, on * this account, G. Morris had been solicited by R. Morris, and consented to pay the money and to retain the judgment to secure the advance. G. Morris, in his answer, expressly denies that any communication was made to him by R. Morris of his motives for asking his assistance in procuring an assignment of the judgment — or that he had ever heard or knew of the claim of the trustees to any part of this 500,000 acre tract, or that the same would, in any manner, be affected by the judgment of Talbot and Allum, until some time after he had paid for the judgment, when it was accidentally communicated to him by A. Hoops, who held the assignment of the same for A. Morris, jun., as before mentioned. Upon receiving this information, G. Morris, with the assistance of his counsel, Thomas Cooper, projected a plan for protecting the interests of the trustees from being sacrificed by a sale under the execution which might issue on that judgment. Articles of agreement were accordingly drawn and executed by G. Morris and A. Hoops on the 29th of August, 1799, by which it was stipulated that the whole of the lands in the county of Ontario, purchased by R. Morris from the State of Massachusetts, amounting to upwards of four millions of acres, should be sold under the judgment, and should be purchased by A. Hoops, who should

[*4]

convey a certain part thereof to G. Morris, and should also mortgage that part of the said land which then belonged to the trustees, to the said G. Morris, for securing the advance made by him on the purchase of the said judgment. Although this large tract of country was, by this arrangement, to be sold under the above judgment, yet that judgment being posterior to the conveyances made to the Holland company, as well as to the other defendants below, they were consequently not bound by the judgment, nor could the title of the grantees have been affected by a sale under it. The object of this agreement, however, in relation to those lands, was to secure to G. Morris a supposed, but totally unfounded claim which R. Morris had asserted to an equity of redemption in one of the large tracts sold by him to the Holland company, and also an imaginary quantity of surplus land presumed by R. Morris to be somewhere within the bounds of this great tract of country which was to be sold, which surplus, as it afterwards turned out, had no *real existence. As to the land belonging to the trustees, which it is admitted was bound by this judgment, G. Morris was contented to receive a mortgage of that to secure his advance for the judgment.

[*5]

A draft of an agreement was also made by Thomas Cooper, by the directions of G. Morris, and delivered to A. Hoops, to be carried to Philadelphia, and to be proposed to R. Morris, and the trustees; but the terms of that agreement do not appear in any part of this record, although it is fairly to be presumed that it did not vary materially from the above agreement between G. Morris and A. Hoops. This draft was not altogether approved by the parties in Philadelphia, and another agreement was accordingly drawn and executed by R. Morris, the trustees, and A. Hoops, bearing date the 16th of September, 1799, which did not materially differ from the agreement of the 29th of August preceding, except that, by the latter, the surplus land, if there should be any, was to be mortgaged to the trustees, as a security for reimbursing the whole or such part of the aforesaid judgment as the trustees might be obliged to pay for the discharge of the mortgage to be given by A. Hoops, for securing the advance made by G. Morris, for the purchase of the judgment.

This agreement was afterwards shown to G. Morris, who expressed some displeasure at its departure from the plan which he had himself arranged; but he admits in his answer that he never communicated his disapprobation either to R. Morris or to the trustees.

It appears, in evidence, that there was a stay of execution on the judgment of Talbot and Allum, for three years from the time it was entered, which of course would not have expired before the 8th of June, 1800. This stay was released by R. Morris at some period

subsequent to the interview which took place at the jail between R. Morris and G. Morris; but the particular time when it was executed does not appear from the record. It is not, however, improbable that it was not long subsequent to the 2d of May, 1799, since it appears that, on that day, R. Morris, jun., in a letter addressed to T. Cooper, directing him to assign the said * judgment to G. [* 6] Morris, requested him also to forward to him the form of a release to be executed by his father.

In pursuance of the arrangement which had been agreed upon between these parties as above mentioned, all the lands which R. Morris had purchased from the State of Massachusetts, in the county of Ontario, were advertised to be sold under the said judgment, on the 6th of February, 1800. Hoops, as it had been agreed, attended on the day of sale and bid for the land; but being overbid, and not having the means to pay for the same in case it should be struck off to him, he prevailed upon the sheriff to adjourn the sale to the 13th of May following, upon his engaging to pay the sheriff his poundage, which undertaking G. Morris, soon afterwards, on application, furnished him with the means of discharging.

On the 22d of April, 1800, G. Morris, without having communicated to R. Morris, or to the trustees, the slightest intimation that he had come to such a determination, assigned over the said judgment to the Holland company for a full consideration paid therefor, and without notice, as they, the Holland company, expressly allege in their answer, of the claim of the trustees, or of the equity stated in their bill.

The same day, articles of agreement were entered into between Thomas L. Ogden, the Holland company, and G. Morris; by which it was stipulated that the sale of all the lands by the execution on the aforesaid judgment, should take place, and should be purchased by the said Ogden, in trust, to convey to the Holland company, the several tracts of land which had been granted to them by R. Morris, and to the several persons to whom conveyances had been made within the limits of the 500,000 acre tract, prior to the deed to the trustees, the tracts to which they were respectively entitled, or such parts thereof as three persons, Hamilton, Cooper, and Ogden, should direct; and as to the residue of the said 500,000, in trust, to convey the same to such persons, in such parcels, and upon such terms as the said Hamilton and others should direct. In execution of this agreement, Ogden attended the sale on the 13th of May, * and purchased the whole of the lands, taken in execution [* 7] under the said judgment, for the sum of $5,200, and received a sheriff's deed for the same. Hamilton, Cooper, and Ogden, in

virtue of the powers vested in them, directed conveyances to be made by Ogden to the Holland company, according to the bounds expressed in the several conveyances to them by R. Morris, except so far as such bounds would interfere with Watson, Cragie, and Greenleaf. In order to compensate the defendants, Samuel Ogden, Sir William Pulteney, and John B. Church, for the land taken on the westward of their tracts, by fixing the true meridian line of the Holland company to the east, the eastern line of those persons is made to run in upon the lands claimed by the trustees, so far as to give the former the full quantity of land mentioned in their respective conveyances. The direction, or award, as it is called, then proceeds to allot to the trustees 58,570 acres, (not half the quantity they claimed,) upon certain conditions, one of which is to pay to the said trustee, for the use of the Holland company, $5,623, with interest from the 22d of January, 1800. This sum, together with others, charged upon such of the grantees as were benefited by this arrangement, were intended to reimburse the Holland company the sums they had advanced, not only for the purchase of Talbot and Allum's judgment, but of another, which, being posterior to the conveyance to the trustees, created of course no lien upon any part of the 500,000 acre tract.

The prayer of the bill is for a conveyance, by Thomas L. Ogden, of all the land to which the trustees are entitled according to its real boundaries, upon the trustees paying such proportion of the money due by Talbot and Allum's judgment as is fairly chargeable on their land, and for general relief.

[* 17] * *February* 20.[1] WASHINGTON, J., after stating the facts of the case, delivered the opinion of the court, as follows:

[* 18] * The first point made by the counsel for the appellants is, that G. Morris ought to be considered as a trustee of Talbot and Allum's judgment for the trustees. On this point it is contended that, although in the first instance, G. Morris might have had no other inducement in purchasing that judgment than to perform a friendly service to R. Morris, yet he afterwards charged himself with the interests of the trustees by an express declaration contained in the agreement of the 29th of August, 1799, connected with the subsequent agreement of the 16th of September, 1799, which, notwithstanding his disapprobation of some parts of it, he adopted by his silence and subsequent conduct. The trust being thus established, it is then contended that the Holland company, the purchasers of this judgment from G. Morris, took the same, clothed with all the equita-

[1] Absent, MARSHALL, C. J., and LIVINGSTON, J.; the other five present.

ble rights of the trustees, which were attached to it in the hands of G. Morris, upon the ground that a judgment is a *chose in action*, and the assignment passes no more than an equitable interest to the debt of which it is the evidence. Having arrived at this point, the title of the trustees is placed upon the well-known principle which governs a court of chancery, that between merely equitable claimants, each having equal equity with the other, he who hath the precedency in time, has the advantage in right.

If the cause rested upon this state of the case, it would be incumbent on the court to examine these principles, and their application to the respective pretensions of the trustees, and of the Holland company. Whether an equity arising to a third person who claims the *chose in action*, and whose title depends upon a secret trust and confidence between him and the ostensible assignee, has equal equity with the person who afterwards purchases the judgment *bonâ fide*, and without notice of a fact not disclosed by the previous assignments, is a question which the court deems it unnecessary to decide, because, though the equity of the trustees and the Holland company should be admitted to be equal, yet the latter have acquired another title to the subject in controversy which a court of equity will never disturb. They, or rather their trustee, have got the fruits of their execution, and have obtained the legal estate in the land on which the judgment gave them only a lien. Having at least equal equity with the trustees, it was perfectly justifiable in them to obtain a superiority by buying in the legal estate.

* Aware of this difficulty, one of the counsel for the ap- [*19]
pellants found it necessary to contend that the sale on the 13th of May was absolutely void, the execution having been taken out before it could lawfully issue in consequence of the stay on record which prevented its emanation prior to the 8th of June following. This, however, is arguing against the fact; because we find that long prior to the sale and assignment of the judgment to the Holland company, the *testatum fi. fa.* had issued by the consent of R. Morris, as well as of the trustees, who, on the 6th of February, 1800, had endeavored to render it effectual by a sale attempted on that day. The release of the stay is not spread on the record so that the terms of it, or its date, might be examined. But since the execution could not legally issue without a regular release filed in the court where the judgment was of record, and since the form of such a release was applied for, by one of the trustees, so early as the 2d of May, 1799, it must be presumed, against the trustees and in favor of the regularity of the proceedings, that the release was in due form, and bore date prior at least to the emanation of the execution.

But it is contended that the consideration for this release was the trust declared by G. Morris in August, 1799, or acquiesced in by him under the agreement of the 16th September, and that his breach of trust in selling the judgment to the Holland company with a view to the intended purchase of the lands in dispute by them, did away the effect of the release previously executed by R. Morris. That this was a legal consequence of the alleged breach of trust can scarcely be maintained. The release being once regularly executed and delivered, could never afterwards be avoided at law by a failure of one of the parties to perform an act in consideration of which the release was given. It could extend no further than to charge G. Morris with a breach of contract for which he might be personally liable to the party aggrieved. But as to third persons claiming fairly under him, without notice of the alleged breach of trust, the legal effect of the release would remain unimpaired.

It is very obvious, however, that the whole of this argument is founded on an assumption of facts which are not proved, and which cannot and ought not to be presumed. It does not appear [*20] from the evidence in the *cause that the trust assumed by G. Morris was the consideration of that release, and yet if the trustees would avail themselves of that circumstance to invalidate the sale, and to deprive the Holland company of the shield by which they have protected their equitable interest, such proof should be clearly made out. On the contrary, the court must consider the fact as established, (since it is asserted on oath by G. Morris in answer to a charge in the bill, that the object of G. Morris in purchasing the judgment was to confer a personal benefit on R. Morris only,) that, in consequence of this undertaking, made with the knowledge of one of the trustees, and for the purpose of giving effect to this intention, the release was made, and it is fairly to be presumed that it was executed long prior to the arrangement made by G. Morris and the trustees in August and September, 1799, because, as has been before observed, the form of a release was applied for as early as the 2d of May preceding. If the date of the release was contemporaneous with, or subsequent to the agreements of August and September, it was in the power of the trustees fully to have established the fact. Being essential to their argument, their having omitted to furnish the proof, affords a strong presumption against them.

It is contended that the Holland company ought to be considered in the light of purchasers of the judgment with notice of the trust, because, knowing, as they were bound to do, that the execution could not issue before the 8th of June, 1800, they were necessarily led to inquire into the right which they assumed of taking out execution

at a prior day, and in making this inquiry they must have come to a knowledge of the trust. But the previous issue of the execution, fortified by the circumstance of the sale under it attempted in February, and continued by adjournment to the 13th of May, rendered all inquiries into the cause of the release unnecessary. It was enough for them that the impediment to the issuing of the execution was removed at the time they purchased the judgment.

The cause appears to the court to be so clearly in favor of the Holland company and those claiming under them, upon the point which has been examined, that it seems almost unnecessary to notice those circumstances which detract from the equitable title of the trustees. *But it is obvious that the injury of which they [*21] complain has arisen in a great measure from the want of energy in themselves, and a kind of helpless dependence upon others, even after they were fully apprized of the steps which were taking and which finally led to the loss from which they now seek to extricate themselves. Mr. Fitzsimmons was informed by A. Hoops, prior to the 22d of April, 1800, that the agent of the Holland company had gone on to New York, and the intention of this visit was most probably communicated to him, as Mr. Hoops, at the same time, advised him to have an understanding with G. Morris. If he received from this advice nothing further than a hint of possible mischief, it was sufficient to put them upon inquiry and exertion.

An attempt was made, though not much pressed, to charge G. Morris with a breach of trust, and with the legal consequences thereof. That his declining to communicate to the trustees his intended sale of Talbot and Allum's judgment to the Holland company, upon terms which might seriously affect the interest of the former, was unkind, and a departure from the friendly conduct he had manifested towards them, may be admitted. But since it must be taken as a fact in the cause, that no promise of any kind had been made by G. Morris in favor of the trustees, or to his knowledge, in reference to their interests, prior to the agreement of the 29th of August, 1779, (and even this agreement, or the draft made by Cooper and forwarded by Hoops to R. Morris and the trustees for their signature, is not alleged in the bill with any degree of certainty as a ground on which the trust is founded,) and since the arrangement proposed by G. Morris in that agreement and draft was rejected by those parties, and another substituted in their stead, to which G. Morris was no party, it would be going too far for a court of equity, in such a case, and, in favor of persons who would do nothing for themselves, to make G. Morris a trustee by implication for the purpose of charging him with a breach of trust. It is true that G. Morris might have communicated to the

trustees his disapprobation of the change they had made in his arrangement, and his refusal to abide by that which they had proposed as a substitute, so as to have afforded them an opportunity to retrace their steps. But surely he was not, in point of law, as [*22] much bound to make such a *communication as the trustees were to obtain a certain knowledge of his assent to the agreement of the 16th September. He had gratuitously offered to do a favor to the trustees upon certain conditions. They reject the offer as made, and propose other conditions. It was incumbent on them to obtain his assent to the new proposal if they meant to consider him in the light of a trustee.

The opinion given upon these points renders it unnecessary to consider the question of boundaries.

Decree affirmed, without prejudice.

10 P. 177.

Brig JAMES WELLS *v.* THE UNITED STATES.

7 C. 22.

If a vessel go to an interdicted port, it is incumbent on the claimant to excuse the *primâ facie* breach of the law, by proving clearly the necessity for doing so.

APPEAL from a sentence of the circuit court of the United States for the district of Connecticut, condemning the vessel for a violation of the Embargo Act of January 9, 1808, (2 Stats. at Large, 453, s. 3.) The defence was, that the master was compelled by stress of weather to put away to St. Bartholomew's, in the West Indies, as a port of necessity, and necessarily landed the cargo to repair the vessel, and could not obtain permission to relade it.

Harper and *Pitkin*, for the appellant.

Dallas, for the United States.

[*25] *WASHINGTON, J., delivered the opinion of the court, as follows:

That the law under which this prosecution is founded has been *primâ facie* violated, is admitted; and it becomes absolutely necessary for the defendant, if he would excuse the breach, to bring him-

self within the exception made for his benefit, not by doubtful testimony, but by such as shall leave no reasonable doubt of the sincerity of his exertions to proceed to some port in the United States, and the danger or apparent impossibility of doing so.

That the vessel, shortly after leaving New York, leaked considerably, is proved; but it is also proved that the leak was in her upper works; that she could be freed, and, by great exertions, was kept free of water.

It is clearly proved that, after a sail of six days, she bore away for the West Indies, and the danger of continuing on the coast is indirectly stated, though nowhere positively affirmed.

But it is not proved by a single witness that an exertion was made to gain a port of the United States, or that the attempt, if it had been made, would, in the opinion of one person on board, have failed or been attended with danger. Nor are the state of the winds, or the *latitude and longitude of the vessel when she [*26] bore away, given in evidence so as to enable the court to judge. In short, had the original destination been to the West Indies, and this known to the crew, it would be difficult to fix perjury upon any one of those who have given evidence in this cause.

In such a case, where no presumption can, or ought to be made in favor of the owner of the vessel, and with so strong a temptation as he had to violate the law—her condemnation is inevitable.

Sentence affirmed, with costs.

MARYLAND INSURANCE COMPANY *v.* LE ROY, BAYARD & M'EVERS.

7 C. 26.

[Absent.—MARSHALL, Chief Justice.]

Liberty to "touch at C. for stock, and to take in water," does not justify taking on board jackasses and bullocks as cargo. Delay for that purpose is a deviation, and it is not material that the risk was not increased.

ERROR to the circuit court of the United States for the district of Maryland, in an action of covenant brought by Le Roy and others, against the Maryland Insurance Company, upon a policy of insurance upon the ship John, from New York to five ports on the coast of "Africa, between Castle D'Elmina and Cape Lopez, including those ports, and at and from them, or either of them, back to New York, with liberties as per order for insurance."

The order of insurance was as follows, namely: "At what rate will you insure $3,500 upon freight of the ship John, of New York, valued at that sum, at and from New York to Castle D'Elmina, on the gold coast of Africa, with liberty for the vessel to touch at the Cape de Verd Islands for the purchase of stock, such as hogs, goats, and poultry, and taking in water?

[* 27] *"Also, $9,000 on the American ship John, valued at this sum; and $11,800 on cargo by said ship, consisting of wine, rum, beef, geneva, dry goods, tobacco, molasses, &c., at and from New York, to five ports on the coast of Africa, between Castle D'Elmina and Cape Lopez, including those ports, with liberty of touching and trading at all, or any of said ports, backwards and forwards, and at and from her last port on the coast, to New York, with liberty of touching at the Cape de Verds on her return passage, for stock, and take in water. It is understood that the captain returning to one or more ports that he had touched and traded at before, shall not be considered a deviation. The John was ready and expected to sail the 13th inst. There are no contraband goods on board, and the ship is armed with eight carriage guns, with ammunition in proportion, and is an excellent vessel, and Captain Lawrence, who commands her, is a native of New York, well acquainted on the coast of Africa, and has been at most of the places it is intended the vessel is to stop at, and is a careful experienced seaman."

The declaration was for a total loss by the perils of the sea. The cause was tried upon the issue of *non infregit conventionem*, and the verdict and judgment were for the plaintiffs, with $5,476 damages.

Upon the trial of this issue the defendants (the plaintiffs in error) took twelve bills of exceptions, but as the opinion of this court was given upon the seventh only, it is deemed unnecessary to state the others.

1. The first bill of exceptions stated not only the facts which the plaintiffs and defendants offered to prove, but detailed at great length the testimony and circumstances tending to prove those facts, or from which they might be inferred. Among other facts, it stated that the ship, in the prosecution of her voyage, arrived at the Island of Fogo, one of the Cape de Verd Islands, on the 7th of May, 1805, where the captain received on board four bullocks, and four jackasses, besides water and other provisions, and unstowed the dry

[* 28] goods and broke open two * bales, and took out forty pieces of each for trade. That the ship remained there until the 24th of May. That the time generally employed by a vessel in taking in stock and water at the Cape de Verd Islands, is from two to three days, unless the weather should be very unfavorable; that the

weather was good, and that the bullocks and jackasses incumbered the deck much more than small stock would have done.

7. The seventh bill of exceptions stated that the defendants gave in evidence all the facts detailed in the preceding bills of exceptions, and thereupon prayed the court to direct the jury, that if they believe the same, then the taking the said jackasses on board the said ship John, while she lay at the Island of Fogo, was not within the privilege allowed to the plaintiffs in this cause to touch at the Cape de Verd Islands, in the performance of the voyage insured, for the purchase of stock, and to take in water, and therefore vitiates the policy, which direction the court refused to give; but the court was of opinion, and accordingly directed the jury, that the taking in the four jackasses at the Isle of Fogo, as aforesaid, did not avoid the policy, unless the risk was thereby increased; whereupon the counsel for the defendants excepted.

*Johnson, J., delivered the opinion of the court, as fol- [* 30] lows:

In deciding on this cause, the court will confine itself to the case made out on the 7th exception. Its decision on the point presented by that exception disposes of the case finally.

The opinion prayed for was, that, by taking in, at Fogo, an additional cargo, not sanctioned by the contract of insurance, the insurers were discharged from their liability under the policy. The charge, delivered by the court, was, that the subsequent liability of the underwriters must depend upon the question, whether any increase of risk resulted from the shipping of that additional cargo.

In this charge, this court are of opinion that the court below erred.

The discharge of the underwriters from their liability in such cases, depends, not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance. The consequences of such violation of the contract are immaterial to its legal effect, as it is, *per se*, a discharge of the underwriters, and the law attaches no importance to the degree in cases of voluntary deviation; necessity alone can sanction a deviation in any case; and that deviation must be strictly commensurate with the *vis major* producing it. The case of Rayne and Bell[1] has been cited as supporting a contrary doctrine.

Without being understood to acquiesce in the correctness of that

[1] 9 East, 195.

decision, it may be remarked that the question was not, in that case, whether the lading, taken in at Gibraltar, was within the terms of the policy, as in the present; but what acts were lawful to be done during the delay, occasioned by a justifiable cause of deviation. On the contrary, the case of Sheriff and Potts,[1] was a case of voluntary departure from the stipulations of the policy, and the de-
[* 31] cision supports the opinion we now give. * It may also be remarked that, in the case of Rayne and Bell, the notice which Lord Ellenborough takes of the case of Sheriff and Potts, virtually admits the doctrine upon which this court founds its decision.

The terms of this policy, so far as connected with this decision, are, "with liberty of touching at the Cape de Verd Islands, on her outward passage, for stock, and to take in water." Touching, in its nautical sense, is known to be the most restrictive word that can be adopted in such a case. Construing the license according to the subject-matter, and in its necessary connection with the offer on the freight, it could mean no more than permission to provision the vessel with live stock, such as is usual on a voyage, and may be procured at the Cape de Verds.

It might, indeed, admit of a doubt whether any of the larger animals used for food, were included within the policy. The words of the first offer certainly were intended to confine the permission to the smaller animals. Stock is a term of the most general import; in its present extended application, it would include a great variety of subjects that never could have entered into contemplation of the parties.

In what sense was the term used? — is the question to be decided: not what uses it might have been applied to in other contracts, or between other parties. The general want of precision in the language of maritime contracts, is an endless source of litigation among mercantile men. Courts of justice are therefore obliged to resort to such reasons as the nature, object, and terms of the contract present, to determine the precise extent of the obligation of the parties.

We feel no inclination to add to the number of causes which vitiate a policy; but the amount of the premium depends upon such a variety of considerations, (as often suggested by caprice as by judgment,) that the contract, whatever it is, must be substantially adhered to.

Judgment reversed.

3 W. 159.

[1] 5 Esp. N. P. C. 96.

*The United States v. Hudson and Goodwin. [* 32]

7 C. 32.

The courts of the United States have no common law jurisdiction in cases of libel against the government of the United States. But they have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders.

This was a case certified from the circuit court of the United States for the district of Connecticut, in which, upon argument of a general demurrer to an indictment for a libel on the President and Congress of the United States, contained in the Connecticut Courant, of the 7th of May, 1806, charging them with having in secret voted $2,000,000 as a present to Bonaparte, for leave to make a treaty with Spain, the judges of that court were divided in opinion upon the question, whether the circuit court of the United States had a common law jurisdiction in cases of libel.

Pinckney, attorney-general, in behalf of the United States, and *Dana*, for the defendants, declined arguing the case.

The Court, having taken time to consider, the following opinion was delivered (on the last day of the term, all the judges being present) by Johnson, J.

The only question which this case presents is, whether the circuit courts of the United States can exercise a common law jurisdiction in criminal cases. We state it thus broadly, because a decision on a case of libel will apply to every case in which jurisdiction is not vested in those courts by statute.

Although this question is brought up now for the first time to be decided by this court, we consider it as having been long since settled in public opinion. In no other case for many years has this jurisdiction been asserted; and the general acquiescence of legal men shows the prevalence of opinion in favor of the negative of the proposition.

*The course of reasoning which leads to this conclusion [* 33] is simple, obvious, and admits of but little illustration. The powers of the general government are made up of concessions from the several States — whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a constituent part of those concessions — that power is to be exercised by courts organized for the purpose, and brought into ex-

istence by an effort of the legislative power of the Union. Of all the courts which the United States may, under their general powers, constitute, one only, the supreme court, possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it. All other courts created by the general government possess no jurisdiction but what is given them by the power that creates them, and can be vested with none but what the power ceded to the general government will authorize them to confer.

It is not necessary to inquire whether the general government, in any and what extent, possesses the power of conferring on its courts a jurisdiction in cases similar to the present; it is enough that such jurisdiction has not been conferred by any legislative act, if it does not result to those courts as a consequence of their creation.

And such is the opinion of the majority of this court. For, the power which congress possesses to create courts of inferior jurisdiction, necessarily implies the power to limit the jurisdiction of those courts to particular objects; and when a court is created, and its operations confined to certain specific objects, with what propriety can it assume to itself a jurisdiction — much more extended — in its nature very indefinite — applicable to a great variety of subjects — varying in every State in the Union — and with regard to which there exists no definite criterion of distribution between the district and circuit courts of the same district?

The only ground on which it has ever been contended that this jurisdiction could be maintained is, that, upon the formation of any political body, an implied power to preserve its own existence and promote the end and object of its creation, necessarily results
[* 34] to it. But *without examining how far this consideration is applicable to the peculiar character of our constitution, it may be remarked that it is a principle by no means peculiar to the common law. It is coeval, probably, with the first formation of a limited government; belongs to a system of universal law, and may as well support the assumption of many other powers as those more peculiarly acknowledged by the common law of England.

But if admitted as applicable to the state of things in this country, the consequence would not result from it which is here contended for. If it may communicate certain implied powers to the general government, it would not follow that the courts of that government are vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power. The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the court that shall have jurisdiction of the offence.

Certain implied powers must necessarily result to our courts of justice from the nature of their institution. But jurisdiction of crimes against the State is not among those powers. To fine for contempt — imprison for contumacy — enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others; and so far our courts no doubt possess powers not immediately derived from statute; but all exercise of criminal jurisdiction in common law cases we are of opinion is not within their implied powers.

1 W. 415; 5 P. 190.

ALEXANDER SHIRRAS, JOHN BLACK, WILLIAM MILLIGAN, WILLIAM BLACKLOCK, and JOSEPH VERREES *v.* JOHN CAIG and ROBERT MITCHEL.

7 C. 34.

The purchaser of an equitable interest takes subject to every existing equity.

The law of Georgia only requiring a deed to be recorded within twelve months from its date, subsequent purchasers can not complain if the deed be recorded within that time.

A deed purporting to secure the repayment of £30,000, may stand as security for the repayment of part of that sum and the indemnity of the mortgagee from liabilities, if there be no fraudulent intent.

APPEAL from the circuit court of the United States for the district of Georgia, by Shirras and others, original complainants, * against Caig and Mitchel, original defendants, in a suit in [* 35] equity to foreclose a mortgage of a lot, houses, and wharf in Savannah, called Gairdner's wharf, which were in the possession of the defendants. The material facts appear in the opinion of the court.

C. Lee and *P. B. Key*, for the complainants.

Harper, for the defendants.

* MARSHALL, C. J., delivered the opinion of the court, as [* 46] follows:

This is an appeal from a decree rendered by the circuit court for the district of Georgia.

Shirras and others, the appellants, brought their bill to foreclose

the equity of redemption on two lots lying in the town of Savannah, alleged to have been mortgaged to them by Edwin Gairdner. The deed of mortgage is dated the first of December, 1801, and purports to be a conveyance from Edwin Gairdner and John Caig, by Edwin Gairdner his attorney in fact. Edwin Gairdner not appearing to have possessed any power to act for John Caig, the conveyance, as to him, is void, and could only pass that interest which was possessed by Gairdner himself. The court will proceed to inquire what that interest was.

It appears that, on the 17th May, 1796, the premises were conveyed to James Gairdner, Edwin Gairdner, and Robert Mitchel, merchants and copartners of the city of Savannah.

In 1799, this partnership was dissolved; and, in Decem-
[* 47] ber in the same year, James Gairdner made an entry *on the books of the company charging this property to Edwin Gairdner & Co., of Charleston, at the price of 20,000 dollars. This firm consisted of Edwin Gairdner alone. James Gairdner also executed a power of attorney authorizing Edwin Gairdner to sell and convey his interest in this and other real property.

In March, 1801, a partnership was formed between Edwin Gairdner and John Caig to carry on trade in Savannah, under the firm of Edwin Gairdner & Co.; and in the same month, Robert Mitchel conveyed his one third of the lots in question to Edwin Gairdner and John Caig.

About the same time it was agreed between the house at Charleston and that in Savannah to transfer the Savannah property to the firm trading at that place; and entries to that effect were made in the books of both companies; and possession was delivered to Edwin Gairdner & Co., of Savannah.

Such was the state of title in December, 1801, when the deed of mortgage bears date.

The plaintiffs claim the whole property, or if not the whole, five sixths; because they suppose Edwin Gairdner to have been equitably entitled to his own third, to that of James Gairdner, and to half of the third of Robert Mitchel. But for this claim the court is of opinion that there can be no just pretension, because he did not affect to convey by virtue of the power from James Gairdner — he did not affect to pass the interest of James Gairdner, but to pass the estate of John Caig and himself. Consequently the power of attorney may be put out of the case, and the conveyance could only operate on his own legal or equitable interest.

In law, he was seized under the original deed, and the deed from Robert Mitchel, of one undivided moiety of the property.

Under the various agreements and entries on the books of the firms at Charleston and Savannah which have been stated, his equitable interest was precisely equal to his legal interest. In law and equity he held one *moiety of the premises in [* 48] question. The other moiety was in John Caig. To one sixth Caig was legally entitled by the conveyance from Robert Mitchel, and to two sixths he was equitably entitled by the agreement with Edwin Gairdner and the consequent entries on the books.

Of the equitable interest of John Caig the mortgagees were bound to take notice, because the purchaser of an equitable interest, purchases at his peril, and acquires the property burdened with every prior equity charged upon it, because the deed itself gives notice of Caig's title, and because Caig was in possession of the property.

The mortgage deed of December, 1801, could not, then, in law or equity, pass more than one moiety of the property it mentions.

A question arises on the face of the deed respecting the extent of the property comprehended in it. The plaintiffs contend that both lots are within the description; the defendants that only the wharf lot is conveyed.

The property conveyed is thus described — "All that lot of land, houses, and wharfs in the city of Savannah as is particularly described by the annexed plat, and is generally known by the name of Gairdner's wharf."

The plat was not annexed, nor was it recorded with the deed. It is, however, filed as an exhibit in the cause, and appears to be a plat of part of the town of Savannah, including the lot on which Gairdner's wharf was, and also one other lot belonging to the same persons, which was designated as No. 6, and which does not adjoin the property on which the wharves are erected.

The words descriptive of the property intended to be conveyed do not appear to the court to be applicable to more than the wharf lot. The word "lot" is in the singular number; the term "houses" is satisfied by the fact that there are houses on the wharf lot; and there is no evidence in the cause, nor any reason to believe that lot No. 6 was "generally known by the name of Gairdner's wharf." The court, therefore, cannot consider that lot as comprehended within the conveyance.

*The mortgaged property is in possession of the defend- [* 49] ants, Caig and Mitchel, who derive their title thereto in the following manner:

On the 7th of January, 1802, a new partnership was formed between Gairdner, Caig, and Mitchel, and, by the articles of copartnery, which are under seal, the Savannah property is declared to be stock

in trade, and an entry was made on the books of the old firm transferring this property to the new concern. On the 12th of the same month, the copartnership of Gairdner and Caig was dissolved.

On the 27th of July, 1802, by deeds properly executed, one third of the property became vested in John Caig, and one other third in Robert Mitchel.

On the 3d of November, 1802, Edwin Gairdner became a bankrupt; and this bill is brought by his mortgagees and assignees.

The claim to foreclose is resisted by Caig and Mitchel, because, they say,

1st. The mortgage was not executed at the time it bears date, but long afterwards, and on the eve of bankruptcy.

2d. That the transaction is not *bonâ fide*, there being no real debt, nor any money actually advanced by the mortgagees.

3d. That the mortgage was kept secret, instead of being committed to record.

4th. That the whole transaction is totally variant from that stated in the deed.

They therefore claim the property for the creditors of Gairdner, Caig, and Mitchel.

1st. From the testimony in the cause it appears that the deed, if not executed on the day, was executed about the day of its date; and that Gairdner, at the time, was believed to be solvent.

[* 50] *2d. It appears, also, that the mortgage was executed, in part, to secure the payment of money actually due at the time, and, in part, to secure sums to be advanced, and to indemnify some of the mortgagees for liabilities to be incurred.

3d. The mortgage is dated the 1st of December, 1801, and was recorded in September, 1802.

By the laws of Georgia, a deed is valid if recorded within twelve months; but any deed recorded within ten days after its execution takes preference of deeds not recorded within that time, or previously on the record.

It appears to the court, that neither negligence, nor that fraud which is inferred from the mere fact of omitting to place a deed on record, can, with propriety, be imputed to the person who has used all the despatch which the law requires. If subsequent purchasers without notice, sustain an injury within the time allowed for recording a deed, the injury is to be ascribed to the law, not to the individual who has complied with its requisition.

In this case, the subsequent purchasers might have proceeded to record their deeds within ten days, and have thereby obtained the preference they claim, but they have failed to do so. They are them-

selves chargeable with the very negligence which they ascribe to their adversaries; and, were they to be preferred, the court would invert the well-established rule of law, and postpone, under similar circumstances, a prior to a subsequent deed.

4th. It is true that the real transaction does not appear on the face of the mortgage. The deed purports to secure a debt of 30,000*l.* sterling, due to all the mortgagees. It was really intended to secure different sums, due at the time from particular mortgagees, advances afterwards to be made, and liabilities to be incurred to an uncertain amount.

It is not to be denied that a deed, which misrepresents the transaction it recites, and the consideration on which it is executed, is liable to suspicion. It must sustain a *rigorous [* 51] examination. It is, certainly, always advisable fairly and plainly to state the truth.

But if, upon investigation, the real transaction shall appear to be fair, though somewhat variant from that which is described, it would seem to be unjust and unprecedented to deprive the person claiming under the deed, of his real equitable rights, unless it be in favor of a person who has been, in fact, injured and deceived by the misrepresentation.

That cannot have happened in the present case.

There is the less reason for imputing blame to the mortgagees, in this case, because the deed was prepared by the mortgagor himself, and executed without being inspected by them, so far as appears in the case.

It is, then, the opinion of the court that the plaintiffs, Shirras and others, have a just title, under their mortgage deed, to subject one moiety of the lot, or parcel of ground, commonly known by the name of Gairdner's Wharf, to the payment of the debts still remaining due to them, which were either due at the date of the mortgage, or were afterwards contracted upon its faith, either by advances actually made or incurred prior to the receipt of actual notice of the subsequent title of the defendants, Caig and Mitchel; and that the decree of the circuit court of Georgia, so far as it is inconsistent with this opinion, ought to be reversed.

5 P. 190; 6 P. 691; 10 P. 177; 14 P. 614; 4 H. 131.

[* 52] Schooner PAULINA'S CARGO v. THE UNITED STATES.

7 C. 52.

Under the 3d section of the Embargo Act of January 9, 1808, (2 Stats. at Large, 453,) a mere transshipment of cargo from one vessel to another, in a port of the United States, did not work a forfeiture.

The 2d section of the Embargo Act of April 25, 1808, (2 Stats. at Large, 499,) only directs a clearance, but does not inflict any forfeiture.

APPEAL from a sentence of the circuit court of the United States for the district of Rhode Island, condemning the cargo of the schooner Paulina. The nature of the proceeding, and the material facts, appear in the opinion of the court.

Pitkin, for the appellant.

Dallas, for the United States.

[* 60] *MARSHALL, C. J., delivered the opinion of the court, as follows:

The libel in this case, as amended in the circuit court for the district of Rhode Island, claims the schooner Paulina and her cargo as forfeited under the 3d section of the act supplementary to the act laying an embargo, and under the 2d section of the act in addition to the original Embargo Act and its several supplements, and under the 50th section of the act regulating the collection of duties on imposts and tonnage.[1]

In the district court both vessel and cargo were acquitted; but in the circuit court the cargo was condemned.

In construing these laws, it has been truly stated to be the duty of the court to effect the intention of the legislature; but this intention is to be searched for in the words which the legislature has employed to convey it. The legislature has declared its object to be to lay an embargo on the vessels of the United States, and to prevent the transportation of any article whatever from the United
[* 61] States to any foreign port or *place; and therefore such transportation is prohibited. To prevent evasions of this law, certain acts which do not in themselves amount to a breach of the embargo, but which may lead to it, have been successively prohibited under such penalties as the wisdom of congress has prescribed.

[1] 1 Stats. at Large, 665.

Those acts become criminal, and subject the person to such punishment as the law inflicts. In ascertaining what they are, the court must search for the intent of the legislature, guided by those rules which the wisdom of ages has sanctioned.

But should this court conjecture that some other act, not expressly forbidden, and which is in itself the mere exercise of that power over property which all men possess, might also be a preliminary step to a violation of the law, and ought therefore to be punished for the purpose of effecting the legislative intention, it would certainly transcend its own duties and powers, and would create a rule instead of applying one already made. It is the province of the legislature to declare, in explicit terms, how far the citizen shall be restrained in the exercise of that power over property which ownership gives; and it is the province of the court to apply the rule to the case thus explicitly described — not to some other case which judges may conjecture to be equally dangerous.

The fact made out in the present case is this:

The Paulina, a registered vessel, lying in the common anchorage ground of Warwick Bay, in the district of Rhode Island, about two hundred fathoms from the shore, received her cargo from The Mayflower, a small vessel of fifteen tons burden, accustomed to ply between Providence and Newport. The lading of The Paulina was continued in open day for several weeks, but not under the inspection of a revenue officer. When her cargo was nearly on board, she was seized and libelled as having violated the acts of Congress which have been mentioned.

The question will, it is conceived, be the more clearly understood, if we consider the laws in the order in which they were passed, and inquire, first, whether the 3d section of the supplementary act has been violated. *In pursuing this inquiry, it is es- [*62] sential to examine how far lading a vessel under the circumstances of The Paulina, was prohibited by the original and supplementary acts without taking into view any subsequent act of Congress.

The original act,[1] passed on the 22d of December, 1807, lays an embargo on all vessels bound to foreign ports, and directs that no clearance be furnished to such vessel. The 2d section directs that before a registered vessel shall receive a clearance for a port in the United States, a bond shall be given with a condition that the cargo shall be relanded in some port of the United States, dangers of the seas excepted.

This act contains no provision applicable to the lading of any ves-

[1] 2 Stats. at Large, 451.

sel whatever, or to licensed vessels, nor does it inflict any forfeiture or penalty on vessels which should depart without a clearance.

The incompetency of this act to effect its object could not be long unobserved. It was soon perceived that foreign trade might be carried on by licensed vessels, and that further regulations respecting registered vessels would also be necessary.

On the 9th of January, 1808, the supplemental act was passed.

The first section directs that bonds shall be given on the part of vessels licensed for the coasting trade, conditioned not to proceed to any foreign port or place, and to reland the cargo in some port of the United States.

The second section contains a proviso declaring that it shall be sufficient for the owners of vessels of the description of The Mayflower, to give bond with a condition not to be employed in any foreign trade.

This review of the prohibitions contained in the original and supplementary embargo acts, was necessary to a complete understanding of the 3d section of the supplemental act, which is the section supposed by the libellants to comprehend the present case.

[*63] *That section is in these words:

"And be it further enacted, That if any ship or vessel shall, during the continuance of the act to which this is a supplement, depart from any port of the United States without a clearance or permit, or if any ship or vessel shall, contrary to the provisions of this act, or of the act to which this act is a supplement, proceed to a foreign port or place, or trade with or put on board of any other ship or vessel any goods, wares, or merchandise, of foreign or domestic growth or manufacture, such ships or vessels, goods, wares, and merchandise shall be wholly forfeited," &c.

This section contemplates three distinct transactions.

1. A departure from any port of the United States without a clearance or permit.

2. Contrary to the provisions of the original or supplementary acts to proceed to a foreign port or place; or,

3. To trade with or put on board any other ship or vessel any goods, wares, or merchandise.

The offence last described is supposed to have been committed by The Paulina.

Nothing can be more apparent than that the legislature could not have intended to prohibit any person from putting a cargo on board a vessel of any description.

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[1] 2 Stats. at Large, 426.

1. The coasting trade was still lawful, and might be carried on by either registered or licensed vessels; consequently, any vessel might be laden for that purpose.

2. There is no direct prohibition to lade a vessel with any articles whatever.

3. There are provisions in subsequent laws on the same subject which regulate the manner of lading vessels in order to entitle them to a clearance; which provisions are entirely incompatible with the idea that all lading was prohibited.

* With a view to this principle the section must be con- [*64] strued.

The first inquiry which presents itself to the mind is this: Do the words "contrary to the provisions of this act, or of the act to which this act is a supplement," limit and restrain both the succeeding members of the sentence, or only the first of them? Are they applicable only to "proceeding to any foreign port or place," or also to "trading with or putting on board any other ship or vessel any goods, wares, or merchandise."

If the sentence be construed literally and grammatically, the introductory words which have been stated, are attached to all the offences afterwards described. The departure without a clearance under any circumstances, is an offence. The circumstances of the departure do not affect the case. But to render the facts afterwards enumerated criminal, they must be committed under circumstances described in the law. "If any ship or vessel shall, contrary to the provisions of this act, or of the act to which this is a supplement, proceed to any foreign port or place, or trade with, or put on board of any other ship or vessel," &c., "such ships or vessels, goods, wares, and merchandise, shall be wholly forfeited." The connection between the different parts of this sentence, is inseparable. There is nothing to disjoin them. The nominative to the verbs, "proceed," "trade with," and "put on board," is the same. It is not repeated, but is to be found in the first part of the sentence, and must be taken in the same sense, and with the same qualifications. The relative "such," in that part of the sentence which inflicts the forfeiture, refers to the ship or vessel, which contrary to the provisions, &c., shall have done any one of the acts described.

If this be the literal construction of the sentence, it is still more apparently its real meaning.

If the words, "trade with, or put on board any other ship or vessel," be not limited by the words "contrary to the provisions of this act, or of the act to which this act is a supplement," they would not only prohibit a vessel from lading, but from unlading in a manner

which is frequent, and perfectly innocent. There are many
[*65] *ports in the United States, whose situation requires that a sea vessel should stop at a considerable distance from the place for which she is destined, and convey part of her cargo in lighters or river craft, to the place of destination. Under such circumstances, to load or unload, would amount to a forfeiture. But such was not the intention of the legislature.

Most apparently, then, both the letter and the spirit of the law must be disregarded, or it must be admitted that the "trading with, or putting on board," that is rendered culpable, must be such a trading with, or putting on board, as is "contrary to the provisions" of the original or supplementary act.

The subsequent words of the section, imposing a penalty of from 1 to $20,000 on the offence, tend still further to illustrate and confirm this construction. They are, "the master or commander of such ship or vessel, as well as all other persons who shall knowingly be concerned in such prohibited foreign voyage, shall forfeit and pay," &c.

The master or commander of the "ship or vessel" described in this part of the sentence, would seem to be the master or commander of any ship or vessel which had committed any one of the offences previously described. If this be true, it is difficult to resist the opinion that the words "as well as all other persons who shall knowingly be concerned in such prohibited foreign voyage," were considered by the legislature as applicable to all the voyages previously prohibited. Consequently the legislature, at the time, supposed themselves to be punishing foreign voyages only.

The Paulina having committed no offence by taking her cargo on board, unless she incurred the penalties of the law by receiving it from The Mayflower, the sentence will now be examined with a view to this question. Is the employment in this way of a vessel whose business is confined to the rivers, bays, and sounds, within the jurisdiction of the United States, a forfeiture of the vessel and cargo?

[* 66] *The bond given by such vessel is, that she will not be employed in any foreign trade.

This exemption from the necessity of relanding the cargo, proves the intention of the legislature that such craft might be employed in lading vessels. This employment is not contrary to the provisions of either the original or supplemental act.

If, then, The Mayflower had transshipped her cargo in the port in which she was laden, it is apparent that no part of the law would have been violated.

The section under consideration inflicts forfeiture on any ship or vessel which shall depart from any port of the United States without a clearance or permit.

If by law this would produce a forfeiture of the cargo when on board The Paulina, it is to be inquired whether, under this libel, the fact of her having passed out of one port into another without a clearance or permit, is examinable.

The libel charges the simple fact of transshipment, without alleging the only circumstance which could render such transshipment criminal. The question, then, of a departure from the port of Providence, into that of Newport, is not brought before the court. It does indeed appear in the evidence, that, in consequence of an opinion among the revenue officers, as well as others, a clearance in such a case was not requisite; The Mayflower carried a considerable part of her cargo to The Paulina without having obtained permits. But the court cannot notice this fact, unless the prosecution had, in some degree, been founded upon it.

It is, then, the opinion of the majority of the court, that, as this case stands, the sentence cannot be sustained under the 3d section of the act of January, 1808. No opinion is given on the construction of that act, in a case of transshipment from a vessel which has actually passed from one district to another, without a clearance.

The libel also claims a forfeiture under the 50th section * of the collection law, and under the 2d section of the act [* 67] commonly called the Additional Act.

It has been very truly observed, that the collection law is in itself totally inapplicable to the case, and can only be relied on for the purpose of explaining the 2d section of the Additional Act, which refers to the collection law.

The operative words of the 2d section are, "No ship or vessel shall receive a clearance, unless the lading shall be made hereafter under the inspection of the proper revenue officers, subject to the same restrictions, regulations, penalties, and forfeitures, as are provided by law, for the inspection of goods, wares, and merchandise, imported into the United States, upon which duties are imposed."

Had the sentence terminated with the word "officers," it is admitted that its only operation would have been to exclude from a right to a clearance a vessel laden in a different manner from that which the act prescribes. The doubt grows out of the residue of the sentence.

This section does not, in terms, refer to the 50th section of the

collection law. Whether, in strict grammatical construction, the adjective "subject," agree with and refer to, the words "lading," "inspection," or "officers," still the "restrictions, regulations, penalties, and forfeitures," which are inflicted, are those which are provided by law for the inspection of goods, not those which are provided by law for unlading them. The word inspection is the governing word which explains the meaning of the sentence; and the provisions for the inspection. of goods contain restrictions, regulations, penalties, and forfeitures; but they do not affect the cargo.

It is difficult to read the sentence without being impressed with the opinion that the sole penalty intended by the legislature was the denial of the clearance. This will strike any person as the principal object of the clause. What follows is expressed with some confusion, and would not seem to constitute the most essential part of the sentence. It cannot be believed that the legislature [* 68] *could intend to inflict so heavy a forfeiture under such cloudy and ambiguous terms. The natural as well as usual course would be to inflict the forfeiture in direct and substantive terms, not by way of loose uncertain reference.

But if this section be construed as the libellants construe it, then if the value of $400 be put on board a vessel, not only the goods so put on board, but the vessel itself, shall be forfeited. For what purpose, then, direct that she shall not receive a clearance? The legislature can scarcely be suspected of making a solemn regulation, which, in terms, forbids its officers to grant a clearance to a vessel, which vessel is, by the same sentence, confiscated.

It is the decided opinion of the court, that no forfeiture is incurred under this section of the act.

The majority of the court is of opinion, that the sentence of the circuit court, condemning the cargo of The Paulina, is erroneous, and ought to be reversed.

The court certified that there was probable cause of seizure.

The chief justice observed, that three of the judges who had heard the argument in the present case, and one who did not hear it, but who had heard the points argued in another case, concurred in this opinion, and that the other judges concurred in the result of the opinion.

Johnson, J., observed, that he dissented from the opinion just delivered by the chief justice, upon one ground only.

He was of opinion that the transshipment, if with intent to prosecute a foreign voyage, in violation of the embargo, subjected the goods to forfeiture. But as the evidence of that intent was doubtful,

he was of opinion that the cargo should be acquitted; and two other judges concurred with him in opinion.

Sentence reversed.

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*NATHANIEL RUSSELL *v.* JOHN L. CLARK'S EXECUTORS, and [* 69] others.

7 C. 69.

If a court of equity has jurisdiction to compel a discovery, it may go on and give relief, though the claim be legal; but it will not do so, if no material discovery is made by the answer.

To subject one man to pay the debt of another, there must be a clear undertaking; if the intent is doubtful the obligation does not exist.

If a representation concerning the credit of another is honestly made, its actual falsehood does not render the person making it liable to an action.

Where a trust was created to pay to W. the amount that shall be recovered and paid from him to N. upon account of a letter of credit, and N. had recovered a judgment at law against W. which was unsatisfied, W., being insolvent, it was held that N. could not, by a bill against the trustee and W., reach the trust fund.

But if the money is to be paid at all events, the person who is ultimately to receive it, under a trust, may sustain such a bill.

Assignees in bankruptcy are indispensable parties to a bill against the bankrupt and certain persons to whom he conveyed property in trust before he was decreed a bankrupt.

APPEAL from the circuit court of the United States for the district of Rhode Island. Nathaniel Russell filed his bill alleging that Jonathan Russell, in behalf of Robert Murray & Co., drew on them certain bills of exchange, which the complainant indorsed for their accommodation, and had been obliged to pay. That he made those indorsements on the faith of the following letters from Clark & Nightingale:

"Providence, 20th January, 1796.

"NATHANIEL RUSSELL, ESQ.

DEAR SIR. Our friends, Messrs. Robert Murray & Co., merchants in New York, having determined to enter largely into the purchase of rice, and other articles of your produce in Charleston, but being entire strangers there, they have applied to us for letters of introduction to our friend. In consequence of which, we do ourselves the pleasure of introducing them to your correspondence as a house on whose integrity and punctuality the utmost dependence may be placed; they will write you the nature of their intentions, and you may be assured of their complying fully with any contract or engage-

ments they may enter into with you. The friendship we have for these gentlemen, induces us to wish you will render them every service in your power; at the same time, we flatter ourselves the correspondence will prove a mutual benefit.

We are, with sentiments of esteem,
Dear sir,
Your most obedient servants,
CLARK & NIGHTINGALE."

[* 70] * "Providence, 21st January, 1796.

"NATHANIEL RUSSELL, ESQ.

DEAR SIR. We wrote you yesterday, a letter of recommendation in favor of Messrs. Robert Murray & Co. We have now to request that you will render them every assistance in your power. Also that you will, immediately on the receipt of this, vest the whole of what funds you have of ours in your hands, in rice, on the best terms you can. If you are not in cash for the sales of the China and Nankins, perhaps you may be able to raise the money from the bank, until due; or purchase the rice upon a credit, till such time as you are to be in cash for them; the truth is, we expect rice will rise, and we want to improve the amount of what property we can muster in Charleston, vested in that article, at the current price; our Mr. Nightingale is now at Newport, where it is probable he will write you on the subject.

We are, dear sir,
Your most obedient servants,
CLARK & NIGHTINGALE."

That Nightingale is dead, and Clark is the surviving partner. That Robert Murray & Co. are bankrupts, and their assignees, residing in New York, cannot be made parties. Clark having died, after answering, his executors became parties. The other material facts, and the scope and substance of the bill and answers, appear in the opinion of the court.

Dexter and *P. B. Key*, for the appellant.

C. Lee and *Jones*, for the appellees.

[* 87] * MARSHALL, C. J., delivered the following opinion:

This is a suit in chancery instituted for the purpose of obtaining from the defendants, payment of certain bills of exchange drawn by Jonathan Russell, an agent of Robert Murray & Co., and

indorsed by Nathaniel Russell; which bills were protested for non-payment, and have since been taken up by the indorser. The plaintiff contends that the house of Clark & Nightingale had rendered itself responsible for these bills by two letters addressed to him, one of the 20th and the other of the 21st of January, 1796, on the faith of which his indorsements, as he says, were made.

The letters are in these words — (see the preceding statement of the case.)

The bill alleges that these letters bind Clark & Nightingale to pay to Nathaniel Russell any sum for which he might credit Robert Murray & Co., either because,

1st. They do, in law, amount to a guaranty — or that,

2d. They were written with a fraudulent intent to be understood as a guaranty — or that,

3d. They contain a misrepresentation of the solidity and character of the house of Robert Murray & Co.

Soon after the protest of these bills for non-payment, Robert Murray & Co. failed and became bankrupts. * Previous to [* 88] their bankruptcy they assigned a great proportion of their effects, including the cargoes for the purchase of which these bills were drawn, to John J. Clark and John B. Murray, in trust for Clark & Nightingale, and for sundry other creditors and purposes mentioned in several trust deeds which are recited in the bill, and which appear in the record. The plaintiff claims to be paid his debt out of this fund.

The answer of John J. Clark was filed, and a certain William Russell, a partner of the house of Joseph and William Russell, who gave a letter of credit and guaranty to the drawer of the bills indorsed by the plaintiff, Nathaniel Russell, was made a party defendant. Against Joseph and William Russell a judgment had been obtained by Nathaniel Russell for the amount of the bills indorsed by him, but they had become insolvent, and no part of this judgment had been discharged.

Many depositions having been taken and sundry exhibits filed, a decree of dismission, without argument, and *pro formâ*, was rendered in the circuit court for the district of Rhode Island, and the cause comes into this court by appeal from that decree.

It is contended by the defendants, that the letters which have been recited create no liability on the part of Clark & Nightingale, but are to be considered merely as letters of introduction. Whatever may be the construction of the letters, they insist that the plaintiff, if entitled to recover, has complete remedy at law, and that a court of chancery can take no jurisdiction of the cause.

It is believed to be unquestionable that a suit in chancery could

not be sustained on these letters against Clark & Nightingale, unless some additional circumstance rendered an application to this court necessary.

The plaintiff contends that such application is necessary, because there are a great variety of facts belonging to the transaction which could not be introduced into a court of law, or which would not avail him in that court, but which are proper for the consideration of a court of equity.

[* 89] *Because some of these facts rest within the knowledge of the defendants — and

Because he cannot, at law, subject the trust-fund to his claim.

So far as respects the question whether these letters constitute a contract of guaranty, there can be no doubt but that the construction in a court of law or a court of equity must be precisely the same, and that any explanatory fact which could be admitted in the one court would be received in the other.

On the question of fraud the remedy at law is also complete, and no case is recollected where a court of equity has afforded relief for an injury sustained by the fraud of a person who is no party to a contract induced by that fraud.

It is true that if certain facts, essential to the merits of a claim purely legal, be exclusively within the knowledge of the party against whom that claim is asserted, he may be required, in a court of chancery, to disclose those facts, and the court, being thus rightly in possession of the cause, will proceed to determine the whole matter in controversy. But this rule cannot be abused by being employed as a mere pretext for bringing causes, proper for a court of law, into a court of equity. If the answer of the defendant discloses nothing, and the plaintiff supports his claim by evidence in his own possession unaided by the confessions of the defendant, the established rules, limiting the jurisdiction of courts, require that he should be dismissed from the court of chancery, and permitted to assert his rights in a court of law.

It is also true, that if a claim is to be satisfied out of a fund, which is accessible only by the aid of a court of chancery, application may be made, in the first instance, to that court, which will not require that the claim should be first established in a court of law.

In the case under consideration, the answer confesses nothing. So far from furnishing any evidence in support of the plaintiff's claim, it denies, in the most full and explicit terms, the whole equity of the bill.

[* 90] *This ground of jurisdiction, therefore, is totally withdrawn from the case.

It remains to inquire whether the plaintiff can be let in to claim on any part of the trust fund; and this depends principally on his claim being within any one of the trusts declared.

The first trust deed, which was executed by Robert Murray & Co. on the 23d day of March, 1798, is declared to be in trust to apply the moneys arising from the trust property "in payment and satisfaction of the debts and balances which shall appear to be found to be due and owing from the said parties of the first part, (Robert Murray & Co.,) to them the said John J. Clark and John B. Murray, (the trustees,) and to such other of the creditors" of the said Robert Murray & Co. as they should, by any instrument of writing, within twelve months, appoint.

It may be doubted whether this declaration of trust would be applicable to a collateral undertaking, not, at the time, carried into judgment.

In the second deed, one of the trusts declared is, to repay Clark & Nightingale for any sums they may pay or be liable to pay under a suit at the time depending against them. That suit was dismissed.

Without deciding whether Russell could avail himself of this trust, having failed in the particular action then depending, the court will proceed to inquire how far Clark & Nightingale were liable to the plaintiff for the debt due to him from Robert Murray & Co.

The law will subject a man, having no interest in the transaction, to pay the debt of another, only when his undertaking manifests a clear intention to bind himself for that debt Words of doubtful import ought not, it is conceived, to receive that construction. It is the duty of the individual, who contracts with one man on the credit of another, not to trust to ambiguous phrases and strained constructions, but to require an explicit and plain declaration of the obligation he is about to assume. In their letter of the 20th, Clark & Nightingale indicate *no intention to take any responsi- [* 91] bility on themselves, but say that Mr. Russell may be assured Robert Murray & Co. will comply fully with their engagements. In their letter of the 21st, they speak of the letter of the preceding day as a letter of recommendation, and add, "we have now to request that you will endeavor to render them every assistance in your power."

How far ought this request to have influenced the plaintiff? Ought he to have considered it as a request that he would advance credit or funds for Robert Murray & Co., on the responsibility of Clark & Nightingale, or simply as a strong manifestation of the friendship of Clark & Nightingale for Murray & Co., and of their solicitude that N. Russell should aid their operations as far as his own view of his

interests would induce him to embark in the commercial transactions of a house of high character, possessing the particular good wishes of Clark & Nightingale?

It is certain that merchants are in the habit of recommending correspondents to each other without meaning to become sureties for the person recommended; and that, generally speaking, such acts are deemed advantageous to the person to whom the party is introduced, as well as to him who obtains the recommendation.

These letters are strong, but they contain no intimation of any intention of Clark & Nightingale to become answerable for Robert Murray & Co., and they are not destitute of expressions alluding to that reciprocity of benefit which results from the intercourse of merchants with each other. "The friendship," say they, in their letter of the 20th, "we have for these gentlemen, induces us to wish you will render them every service in your power, at the same time we flatter ourselves this correspondence will prove a mutual benefit."

Mr. Russell appears to have contemplated the transaction as one from which a fair advantage was to be derived. He received a commission on his indorsements.

[*92] The court cannot consider these letters as constituting a contract by which Clark & Nightingale undertook *to render themselves liable for the engagements of Robert Murray & Co., to Nathaniel Russell. Had it been such a contract, it would certainly have been the duty of the plaintiff to have given immediate notice to the defendants of the extent of his engagements.

It remains to inquire whether these letters contain such a misrepresentation of the circumstances and character of the house of Robert Murray & Co., as to render them accountable to the plaintiff for the injury he has sustained by trusting that company.

The question, how far merchants are responsible for the character they give each other, is one of much delicacy, and of great importance to the commercial world.

That a fraudulent recommendation (and a recommendation known at the time to be untrue would be deemed fraudulent) would subject the person giving it to damages sustained by the person trusting to it, seems now to be generally admitted. The case of Pasley *v.* Freeman, reported in 3 Durnford and East, 51, recognizes and establishes this principle. Indeed, if an act, in itself immoral, in its consequences injurious to another, performed for the purpose of effecting that injury, be not cognizable and punishable by our laws, our system of jurisprudence is more defective than has hitherto been supposed.

But this does not appear to the court to be the case described. It is proved, incontestibly, that when the letters on which this suit de-

pends, were written, Robert Murray & Co., were in high credit, and were carrying on business to a great extent, which was generally deemed profitable. The bill charges particular knowledge in Clark & Nightingale that this apparent prosperity was not real. But this, as well as every other allegation of fraud, is explicitly denied by the answer; and the answer, being responsive to the bill, is evidence. Had the plaintiff been able to exhibit proofs which would have rendered this fact doubtful, it might have been proper to have directed an issue for the purpose of trying it; but he has exhibited no such proofs.

In writing the letters, then, recited in the bill, Clark *& [*93] Nightingale stand acquitted of the imputation of fraud.

But it is contended by the plaintiff, that the representation they made of the circumstances of Robert Murray & Co., was, at the time, untrue; and that this misrepresentation, whether made ignorantly or knowingly, was equally injurious to Nathaniel Russell, and equally charges them with the loss he has sustained by trusting to their assurances.

The fact that Robert Murray & Co. were not, in January, 1796, in solvent circumstances, is not clearly made out; but the cause does not rest entirely on this fact. The principle, that a mistake in such a fact as the real internal solidity of a mercantile house, whose external appearance is unsuspicious, shall subject the person, representing their solidity to another, to the loss sustained by that other in trusting to this representation, is not admitted.

Merchants know the circumstances under which recommendations of this description must be given. They know that when one commercial man speaks of another in extensive business, he must be presumed to speak from that knowledge only which is given by reputation. He is not supposed to have inspected all the books and transactions of his friend, with the critical eye which is employed in a case of bankruptcy. He must, therefore, be supposed to speak of the credit, not of the actual known funds of the person he recommends; of his apparent, not of his real solidity. In such a case, it is certainly incautious and indiscreet to use terms which imply absolute and positive knowledge. It may, perhaps, be admitted that, in such a case, fraud may be presumed on slighter evidence than would be required in a case where a letter was written with more circumspection. Yet, even in such a case, where the communication is honestly made, and the party making it has no interest in the transaction, he has never been declared to be responsible for its actual verity. The reason of the rule is, that merchants generally possess, and are therefore presumed, in their correspondence, to speak from that knowledge only

of the circumstances of other merchants, which may be ac-
[*94] quired by observing *their course of business, their punctuality, and their general credit.

This principle appears to have been fully considered in the case of Haycraft *v.* Creasey, reported in 2 East. 92, in which case all the authorities were reviewed. It does not appear that a single decision has been ever made, asserting the liability of the writer of such a letter. The case of Haycraft *v.* Creasey denies his liability; and that case appears to this court to have been decided in conformity with all previous adjudications.

It is, therefore, the opinion of the court, that Clark & Nightingale, having believed, and had reason to believe, so far as is shown by the evidence in this cause, that the representation they made to the plaintiff, of the character and circumstances of Robert Murray & Co., was true, are not liable to the plaintiff, in consequence of that representation, for the credit he gave to that company.

A claim is also set up to the funds in the hands of Clark & Nightingale, founded on the circumstance that they consist, in part, of the rice purchased with the bills indorsed by the plaintiff. But as no specific lien is alleged to have existed, and as the particular fraud, alleged to have been committed to acquire those funds, is not proved, this claim is unsustainable.

The plaintiff, then, cannot be considered as a trust creditor in consequence of any claim he can assert against Clark & Nightingale.

The second deed, which is dated on the 24th day of March, 1798, is also in trust "to pay to Joseph and William Russell, the amount that shall be recovered and paid from them to Nathaniel Russell," &c., "upon account of a letter of credit," &c., "and for which the said Nathaniel Russell hath recovered a judgment against the said Joseph and William Russell."

No part of this judgment has ever been paid, and Joseph and William Russell are insolvent. The state of things, then, has perhaps not yet occurred, in which Joseph and William Russell could
[*97] demand the execution *of the trust; and the court, though with some hesitation, feels constrained to decide that, under the terms of this trust, Nathaniel Russell, claiming through Joseph and William Russell, cannot demand its execution directly to himself.

It also appears that, in September, 1796, Robert Murray & Co. assigned to Loomis & Tillinghast, certain personalties in trust. This assignment was surrendered to Clark & Nightingale in consideration of notes to a large amount, in which Loomis & Tillinghast were bound for Robert Murray & Co. It appears that Clark

& Nightingale are otherwise secured with respect to these notes: at least, there is reason to believe that they are secure.

Clark & Nightingale, having taken this assignment with notice of the trust, take it clothed with the trust. They are trustees for the same uses and to the same extent with Loomis & Tillinghast.

A paper appears in the cause, which purports to be the assignment to Loomis & Tillinghast. The assignment is in trust, first, to repay themselves any sums which they may pay on account of certain undertakings made by them for Robert Murray & Co., and, secondly, in trust "to pay to Joseph and William Russell all such moneys as they shall be liable to pay, as guaranty as aforesaid, to Nathaniel Russell upon bills," &c., reciting the bills for which this suit is instituted.

It is settled in this court, that the person for whose benefit a trust is created, who is to be the ultimate receiver of money, may sustain a suit in equity, to have it paid directly to himself.

This trust being to pay Joseph and William Russell a sum they are liable to pay to Nathaniel Russell, and being created in such terms that the money is certainly payable to them, the purposes of equity will be best effected by decreeing it, in a case like the present, to be paid directly to Nathaniel Russell. Indeed, a court ought not to decree a payment to Joseph and William Russell, without security, that the debt to Nathaniel Russell should be satisfied.

*But it is not shown, by any legal evidence, that this paper [* 98] is the assignment which was made in trust to Loomis & Tillinghast, and transferred by them to Clark & Nightingale. Its verity is not admitted by the defendants, nor proved by the plaintiff.

Nor are the circumstances under which the transfer was made, nor the present circumstances of the trust, sufficiently before the court, to enable it to decide with certainty, whether the prior trust to Loomis & Tillinghast is satisfied, or otherwise so secured, that the trust fund may now be applied to the debt of Joseph and William Russell.

Could these defects be supplied, the court would still be unable to decree in favor of the plaintiff, for want of proper parties.

The incapacity imposed on the circuit courts to proceed against any person residing within the United States, but not within the district for which the court may be holden, would certainly justify them in dispensing with parties merely formal. Perhaps in cases where the real merits of the cause may be determined without essentially affecting the interest of absent persons, it may be the duty of the court to decree, as between the parties before them. But in this case, the assignees of Robert Murray & Co. are so essential to the

merits of the question, and may be so much affected by the decree, that the court cannot proceed to a final decision of the cause till they are parties. They may contest the validity of all the deeds under which both parties claim, and assert in themselves, for the benefit of the creditors generally, a right to the whole fund. Certainly this court ought not, on light grounds, and without due precaution, to change the hands in which this fund is placed, until any claim of the assignees to it may be decided.

Should this difficulty be obviated by suspending the effect of the decree, till the validity of the trust deeds should be decided, or by directing security to be given, another presents itself, which cannot be removed. The assignees have a right to contest the claim of Nathaniel Russell, and may either deny its original validity, [* 99] or *show that it has been paid. They are, then, essential parties, and the court ought not to decree in favor of the plaintiff, without them. It is possible, that they may consent to make themselves parties in this cause, and, as a court may, instead of dismissing a bill brought to a hearing without proper parties, give leave to make new parties, the court will, in this case, set aside the decree of the circuit court, dismissing this bill, and remand the cause to the circuit court, with leave to make new parties.

10 W. 181; 7 P. 113; 10 P. 482; 10 P. 497; 12 P. 207; 1 H. 169; 8 H. 402; 17 H. 130, 478. 18 H. 467; 19 H. 271.

Schooner Catherine v. The United States.

7 C. 99.

If the counsel for the appellant neglect to furnish the court with a statement of the points of the case, the appeal will be dismissed.

This case was dismissed because the counsel for the appellant had not furnished the court with a statement of the points of the case, agreeably to the general rule on that subject.

It was afterwards reinstated by consent of parties.

Bingham and others *v.* Morris and others.

7 C. 99.

The rule to dismiss a writ of error for not filing the transcript of the record within the first six days of the term, does not apply to cases where the transcript shall have been filed before the motion to dismiss.

Meredith moved the court to dismiss this appeal, because the transcript of the record was not filed within the first six days of the term, agreeably to the general rule. The transcript was filed on the 13th day of the term, and before the motion to dismiss.

The Court said that they did not consider the rule as applying to any case where the transcript shall have been filed before the motion for dismissal.

Motion overruled.

The Sloop Active *v.* The United States.

7 C. 100.

Under the Embargo Act of January 9, 1808, (2 Stats. at Large, 453, s. 3,) a departure from port without a clearance is necessary to consummate the offence.

Sailing within the port, with intent to depart, is not sufficient.

Under the Collection Act of February 18, 1793, (1 Stats. at Large, 316, ss. 32, 33,) cargo not subject to duties, and not belonging to the owner, master, or mariners, was not forfeited, by reason of a licensed vessel being employed in a trade for which she was not licensed.

Appeal from a sentence of condemnation of the sloop Active and cargo, by the circuit court of the United States for the district of Connecticut. The nature of the proceeding, and the material facts, appear in the opinion of the court.

Pitkin and *Dana*, for the appellants.

Dallas, and *Pinkney*, attorney-general, for the United States.

* Marshall, C. J., delivered the opinion of the court, as [*105] follows:

The sloop Active, a vessel licensed for the fishing trade, was laden, in the night of the 4th of July, in the year 1808, in the port of New London, and was seized by the revenue officer, after having left the wharf without a clearance, under circumstances which justify a belief that she was about to proceed on a foreign voyage in violation of the acts laying an embargo. The vessel and cargo were libelled as having been forfeited under the laws of the United States, and were both condemned in the district court, which sentence was affirmed in the circuit court.

This sentence is supported on the part of the United States under the 3d section of the supplementary act to the act laying an embargo, and the 32d section of the act for enrolling and licensing ships or vessels to be employed in the coasting trade and fisheries.

[*106] *This court is of opinion, that however criminal the intentions of those on board The Active might have been, neither the vessel nor cargo were forfeited under the 3d section of the "act supplementary to the act, entitled an act laying an embargo on all ships and vessels in the ports and harbors of the United States," because she appears to have been seized in port; and a departure from port without a clearance was necessary to consummate the offence.

The case is undoubtedly within the words of the 32d section of the Enrolling and Licensing Act. The Active was a licensed vessel employed in a trade other than that for which she was licensed.

The argument that this act was intended merely to secure the revenue, and that its provisions do not contemplate a vessel laden with domestic produce not subject to duty, has been urged with great force, and certainly derives much strength from the various sections of the act which have been quoted. But the words of the 32d section are explicit, and although other preceding sections furnish much reason for believing that a forfeiture in a case where the revenue could not be defrauded, might not be contemplated by the legislature, yet they are not so expressed as to control the 32d section. The Active and her cargo, therefore, must be considered as forfeited, except so far as they come within the 33d section.

That section is in these words: "Provided nevertheless, and be it further enacted, that in all cases where the whole or any part of the lading, or cargo on board, any ship or vessel, shall belong, *bonâ fide*, to any person or persons other than the master, owner, or mariners, of such ship or vessel, and upon which the duties shall have been previously paid or secured, according to law, shall be exempted from any forfeiture under this act, any thing therein contained to the contrary notwithstanding."

In this case the libel states, that —— Billings and —— Morgan

were owners of the vessel, and a certain —— Gates owner of the cargo. A claim is filed by Billings and Morgan for the vessel and part of *the cargo, and by Gates for the residue [*107] of the cargo. It appears, then, both from the libel and claim, that a part of the cargo did "belong, *bonâ fide*, to a person other than the master, owner, or mariners, of the ship or vessel." This part of the cargo comes completely within that part of the description which relates to the ownership of the property. But the goods on board being liable to no duty, the duties could not have been previously paid or secured.

The court considers this section as manifesting a clear intention in the legislature to exempt from forfeiture a cargo not belonging to the owner, master, or mariners, provided that cargo was not liable to duties. Whether this condition was produced by a previous payment of duties, or by a perfect exemption from duties, must be immaterial. Duties cannot be paid or secured, according to law, on goods not liable, by law, to duty. The legislature must be understood, when saying "upon which the duties have been previously paid or secured according to law," to mean, "upon which the duties, if any, have been previously paid," &c.

It is the opinion of the court, that the sentence of the circuit court be reversed as to so much of the cargo of the sloop Active as is claimed as the property of —— Gates, and be affirmed as to the vessel and the residue of the cargo.

And it is directed to be certified that there was probable cause of seizure.

HAWTHORNE, Claimant of the Brig Clarissa Claiborne, *v.* THE UNITED STATES.

7 C. 107.

This court will grant a commission to take new evidence to be used here, in a case of admiralty jurisdiction.

THIS was an appeal from the sentence of the district court, New Orleans, condemning the brig Clarissa Claiborne, for violating a law of the United States.

**Hare*, moved for a *certiorari* upon a suggestion of di- [*108] minution of the record, in not sending up the depositions of the witnesses.

MARSHALL, C. J. What prevents you from producing the witnesses here, or taking their depositions *de novo?*

Hare suggested a doubt, whether cases for violation of the embargo, are cases of admiralty, or of prize jurisdiction.

However, on a subsequent day, he moved for and obtained a commission to take the depositions of witnesses at New Orleans, to be used on the trial in this court, at the next term.

A like commission was granted in the case of Williams and Armroyd, at this term.

THE UNITED STATES *v.* JOHN GOODWIN.

7 C. 108.

No writ of error lies to the supreme court of the United States, to reverse the judgment of a circuit court in a civil action, which has been carried up to the circuit court from the district court, by writ of error.[1]

THIS was an action of debt brought originally in the district court, for the district of Pennsylvania, by the United States, against John Goodwin, for $15,000, as a penalty for not entering goods agreeably to the prime cost, at the place of exportation, with intent to defraud the revenue. The judgment of the district court, which was in favor of the United States, was, upon a writ of error, reversed in the circuit court; and thereupon the United States sued out the present writ of error to this court.

A doubt having been suggested, whether this court could take jurisdiction by writ of error, in a civil action, which had been carried up by writ of error, from the district court to the circuit court, that question was submitted to this court without argument.

[*109] *WASHINGTON, J., delivered the opinion of the court, as follows:

This case stands upon a writ of error to the circuit court, for the district of Pennsylvania. By the record, it appears that an action of debt was brought, in the name of the United States, against the defendant in error, in the district court of Pennsylvania; in which judgment was rendered for the United States. On a writ of error to the circuit court for that district, that judgment was reversed; and

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[1] By the act of July 4, 1840, s. 8, (5 Stats. at Large, 393,) jurisdiction was given to the supreme court.

upon like process, the cause has been brought into this court, for reëxamination. A rule has been obtained by the defendant in error, upon the United States, to show cause why the writ of error should not be dismissed; and the ground of the rule is, that, as the cause was not removed from the district into the circuit court, by appeal, but by writ of error, there is no provision in any of the laws of the United States, giving jurisdiction to this court, to reëxamine the judgment of the circuit court, upon a writ of error or otherwise. This question can only be decided by an attentive consideration of the different acts of Congress on this subject.

The 21st section of the judicial law[1] of 1789, declares, that from final decrees in a district court in cases of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds $300, an appeal shall be allowed to the circuit court. The 22d section provides, that final decrees and judgments in civil actions, in a district court, where the matter in dispute exceeds the value of $50, exclusive of costs, may be reëxamined and reversed or affirmed in a circuit court, upon a writ of error. This section then proceeds to declare, that, upon a like process, (that is to say upon a writ of error,) may final judgments and decrees in civil actions and suits in equity, in a circuit court, brought there by original process, or removed there from the state courts, or by appeal from a district court, where the value exceeds $2,000, exclusive of costs, be reëxamined and reversed or affirmed in the supreme court.

* The 2d section of the act of the 3d of March, 1803,[2] so [*110] far changes the above sections of the act of 1789, that whereas the latter allows an appeal from the district to the circuit court, only in admiralty and maritime cases, where the value in dispute, exclusive of costs, exceeds $300, the former provides an appeal from all final judgments or decrees in a district court, where the matter in dispute, exclusive of costs, exceeds $50, and also an appeal to the supreme court, from all final decrees and judgments in a circuit court, in cases of equity, of admiralty, and maritime jurisdiction, and of prize or no prize, where the value, exclusive of costs, exceeds $2,000. But this law makes no provision for the appellate jurisdiction of the supreme court in any other cases than those above mentioned. Consequently, we must refer to the sections of the act of 1789, before noticed, (which are still in force, except so far as they are inconsistent with the provisions of the act of 1803,) to see in what cases, other than those provided for by the act of 1803, the supreme court can review the decisions of the circuit courts. It has been

[1] 1 Stats. at Large, 83.

[2] 2 Stats. at Large, 244.

shown, that all final judgments or decrees in civil actions and suits in equity, in a circuit court, brought there by original process, or removed from the state courts, or by appeal, from a district court, may be reëxamined in the supreme court, upon a writ of error. But no case can, under this act, be removed from a district court by appeal, except it be of admiralty and maritime jurisdiction; and, consequently, under the literal construction of this law, no other cases could be carried from the circuit court to the supreme court. The question, then is, whether the word appeal, in the 22d section, is to be understood technically, or merely as descriptive of the appellate jurisdiction of the superior court, without regard to the particular mode by which a cause is transmitted to that jurisdiction? This question appears to have been considered by the supreme court so early as the year 1796, in the case of Wiscart *v.* Dauchy, 3 Dallas, 321. Chief Justice Ellsworth, in delivering the opinion of the court in that case, expresses himself as follows: "The act of 1789,[1] speaks of appeal and writ of error, but does not confound them. They are to be understood according to their ordinary acceptation. An appeal is a civil law process, and removes a cause entirely, subjecting the law and [*111] fact, to a review and *retrial. A writ of error is a common law process, and removes for reëxamination nothing but the law. This statute observes this distinction. In admiralty and maritime causes, an appeal is allowed from the district to the circuit court, if the matter in dispute exceeds $300, and yet decrees and judgments in civil actions may be removed by writ of error, from the district to the circuit court, though the value barely exceeds $50." In another part of this opinion, the judge adds, "that as to the appellate jurisdiction of the supreme court, the 22d section says, and upon a like process, that is, upon a writ of error, shall final judgments and decrees in civil actions, namely, cases not criminal, and suits in equity, &c. Among the causes which may be brought to the supreme court, by writ of error, are cases which had been removed to the circuit court, by appeal from a district court, which can only be cases of admiralty and maritime jurisdiction."

The objection made to this interpretation of the word appeal, that judgments in civil actions at common law, commenced in a district court, could be reëxamined only in a circuit court, if well founded in itself, could not, with any propriety, be addressed to courts, after the legislative meaning of the term is ascertained. The technical distinction between a writ of error, and an appeal, and between the different cases to which they were applicable, was clearly marked in the act of the 13th of February, 1801,[2] which was afterwards repealed

[1] 1 Stats. at Large, 73.

[2] 2 Stats. at Large, 89.

by the act of the 8th of March, 1802.[1] The former act, after providing for the removal of all final judgments or decrees, above the value of $50, from a district to a circuit court, by appeal, and by a like proceeding for a removal to the supreme court, of those cases only, which were of equity, of admiralty and maritime jurisdiction, and of prize or no prize, proceeded to provide for civil actions at common law, originating in a district court, by declaring that final judgments, in such cases, if of a certain value, might be removed at once, from the district to the supreme court, by writ of error. So that, as the law stood at that time, a party, in cases at common law, had an election to carry his case, where it exceeded $2,000, by writ of error, from the district to the circuit court, under the 22d section of the act of 1789, but without the privilege of proceeding *far- [*112] ther, or to proceed with his cause at once, to the supreme court, passing by the circuit court. But it appears not to have been the policy of the legislature at that time, to subject the decisions of the district court, in civil cases at common law, to more than one reëxamination in an appellate court.

7 C. 287; 5 P. 190; 6 P. 470; 12 P. 143; 14 P. 614.

Whelan v. The United States.

7 C. 112.

Cases of seizure upon waters navigable from the sea, by vessels of more than ten tons burden, for breach of the laws of the United States, are civil cases of admiralty and maritime jurisdiction, and are to be tried without a jury.

This cause standing so late on the docket, that it was not likely to be called for trial at this term, *Dallas*, for the United States, suggested the propriety of assigning a particular day for the hearing, as it was a case of importance, and involved a question of jurisdiction, namely: whether a seizure of a vessel, on waters navigable from the sea for vessels of ten and more tons burden, for breach of a law of the United States, was to be tried by a jury. This question was said to be important, because the judge of the district of Pennsylvania had refused to try any cases of that kind, until the question was finally settled by this court.

[1] 2 Stats. at Large, 132.

The court accordingly assigned a day for hearing that question, but intimated an opinion that it was already decided in the cases of The Vengeance, 3 Dall. 297; The Betsey and Charlotte, 4 Cranch, 433; and Yeaton *v.* United States, 5 Cranch, 281.

E. Tilghman, for the appellant, after looking into those cases, abandoned the question as to jurisdiction, considering the cases cited as conclusive against him.

THE COURT said that the question had been certainly settled in this court, upon full argument.

5 H. 441.

[*113] * THE UNITED STATES *v.* The Brig ELIZA.

7 C. 113.

Under the Embargo Act of January 9, 1808, (2 Stats. at Large, 453, s. 3,) the offence was not complete until the arrival of the vessel at a foreign port. But on her return the vessel was liable to seizure.

APPEAL from a decree of the circuit court of the United States for the district of Delaware, dismissing a libel filed by the United States against The Eliza, for having proceeded to a foreign port or place, contrary to section 3, of the act of January 9, 1808, (2 Stats. at Large, 453.)

Dallas, for the United States.

J. R. Ingersoll, for the claimant.

[*115] * MARSHALL, C. J., stated that it was the opinion of the court that the vessel was liable to seizure; but that a majority of the court was of opinion that the offence was not complete until the arrival of the vessel in a foreign port; but the facts of the case do not appear, so as to enable the court to decide that point; the cause is therefore continued for further proof.

The United States v. Jonah Crosby.

7 C. 115.

The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate.

This case is fully stated in the following opinion of this court, which was delivered by

Story, J., on the 24th of February, all the judges being present,—

A writ of intrusion was brought by the United States, against the defendant in error, to recover possession of an undivided part of certain land lying within the district of Maine. Upon the trial of the cause in the district court of that district, a special verdict was found by the jury, upon which the same court gave judgment in favor of the defendant in error. This judgment was afterwards affirmed in the circuit court of Massachusetts, and is now before the supreme court for a final decision.

By the special verdict, it appears that the claim of the United States to the land in controversy is under one * Nathan- [*116] iel Dowse, who derived his title, if any, from an instrument stated at large in the same verdict, and executed in his favor by one John Nelson. The instrument is without a seal, and was executed at the Island of Grenada, in the West Indies, before a notary public, according to the mode prescribed by the existing laws to pass real estate in that colony; and both parties were, at that time, residents therein.

By the laws of Massachusetts, no estate of freehold in land can be conveyed unless by a deed or conveyance, under the hand and seal of the party; and to perfect the title as against strangers, it is further requisite that the deed should be acknowledged before a proper magistrate, and recorded in the registry of deeds for the county where the land lies.

The question presented for consideration is, whether the *lex loci contractus* or the *lex loci rei sitæ* is to govern in the disposal of real estates.

The court entertain no doubt on the subject; and are clearly of opinion that the title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate. The judgment of the circuit court must, therefore, be affirmed.

9 W. 565; 10 W. 192; 5 H. 233.

The Schooner EXCHANGE v. M'FADDON and others.

7 C. 116.

A public armed vessel, in the service of a sovereign at peace with the United States, is not within the ordinary jurisdiction of our tribunals while in a port of the United States. But the sovereign power of the United States may interpose, and impart such a jurisdiction.

[* 117] * APPEAL from the sentence of the circuit court of the United States for the district of Pennsylvania.

The case was this; on the 24th of August, 1811, John M'Faddon, and William Greetham, of the State of Maryland, filed their libel in the district court of the United States, for the district of Pennsylvania, against the schooner Exchange, setting forth that they were her sole owners, on the 27th of October, 1809, when she sailed from Baltimore, bound to St. Sebastians, in Spain. That while lawfully and peaceably pursuing her voyage, she was, on the 30th of December, 1810, violently and forcibly taken by certain persons, acting under the decrees and orders of Napoleon, Emperor of the French, out of the custody of the libellants, and of their captain and agent, and was disposed of by those persons, or some of them, in violation of the rights of the libellants, and of the law of nations in that behalf. That she had been brought into the port of Philadelphia, and was then in the jurisdiction of that court, in possession of a certain Dennis M. Begon, her reputed captain or master. That no sentence or decree of condemnation had been pronounced against her, by any court of competent jurisdiction; but that the property of the libellants in her remained unchanged and in full force. They therefore prayed the usual process of the court, to attach the vessel, and that she might be restored to them.

Upon this libel the usual process was issued, returnable on the 30th of August, 1811, which was executed and returned accordingly, but no person appeared to claim the vessel in opposition to the libellants. On the 6th of September, the usual proclamation was made for all persons to appear and show cause why the vessel should not be restored to her former owners, but no person appeared.

On the 13th of September, a like proclamation was made, but no appearance was entered.

[* 118] On the 20th of September, *Mr. Dallas*, the attorney * of the United States, for the district of Pennsylvania, appeared, and (at the instance of the executive department of the government

of the United States, as it is understood,) filed a suggestion, to the following effect:

Protesting that he does not know, and does not admit the truth of the allegations contained in the libel, he suggests and gives the court to understand and be informed,

That inasmuch as there exists between the United States of America, and Napoleon, Emperor of France, and King of Italy, &c., &c., a state of peace and amity; the public vessels of his said imperial and royal majesty, conforming to the law of nations, and laws of the said United States, may freely enter the ports and harbors of the said United States, and at pleasure depart therefrom without seizure, arrest, detention, or molestation. That a certain public vessel described, and known as the Balaou, or vessel No. 5, belonging to his said imperial and royal majesty, and actually employed in his service, under the command of the Sieur Begon, upon a voyage from Europe to the Indies, having encountered great stress of weather upon the high seas, was compelled to enter the port of Philadelphia, for refreshment and repairs, about the 22d of July, 1811. That having entered the said port from necessity, and not voluntarily; having procured the requisite refreshments and repairs, and having conformed in all things to the law of nations, and the laws of the United States, was about to depart from the said port of Philadelphia, and to resume her voyage in the service of his said imperial and royal majesty, when on the 24th of August, 1811, she was seized, arrested, and detained, in pursuance of the process of attachment issued upon the prayer of the libellants. That the said public vessel had not, at any time, been violently and forcibly taken or captured from the libellants, their captain and agent, on the high seas, as prize of war, or otherwise; but that if the said public vessel, belonging to his said imperial and royal majesty as aforesaid, ever was a vessel navigating under the flag of the United States, and possessed by the libellants, citizens thereof, as in their libel is alleged, (which, nevertheless, * the said attorney does not admit,) the property of the [*119] libellants in the said vessel was seized and divested, and the same became vested in his imperial and royal majesty, within a port of his empire, or of a country occupied by his arms, out of the jurisdiction of the United States, and of any particular State of the United States, according to the decrees and laws of France, in such case provided. And the said attorney submitting, whether, in consideration of the premises, the court will take cognizance of the cause, respectfully prays, that the court will be pleased to order and decree, that the process of attachment, heretofore issued, be quashed; that the libel be dismissed with costs; and that the said public ves-

sel, her tackle, &c., belonging to his said imperial and royal majesty, be released, &c. And the said attorney brings here into court the original commission of the said Sieur Begon, &c.

On the 27th of September, 1811, the libellants filed their answer to the suggestion of the district attorney, to which they except, because it does not appear to be made for, or on behalf, or at the instance of the United States, or any other body politic or person.

They aver, that the schooner is not a public vessel, belonging to his imperial and royal majesty, but is the property of the libellants. They deny that she was compelled by stress of weather to enter the port of Philadelphia, or that she came otherwise than voluntarily; and that the property of the libellants in the vessel never was divested, or vested in his imperial and royal majesty, within a port of his empire, or of a country occupied by his arms.

The district attorney produced the affidavits of the Sieur Begon, and the French consul, verifying the commission of the captain, and stating the fact that the public vessels of the emperor of France never carry with them any other document or evidence that they belong to him, than his flag, the commission, and the possession of his officers.

In the commission, it was stated that the vessel was armed at Bayonne.

[*120] On the 4th of October, 1811, the district judge * dismissed the libel with costs, upon the ground that a public armed vessel of a foreign sovereign, in amity with our government, is not subject to the ordinary judicial tribunals of the country, so far as regards the question of title, by which such sovereign claims to hold the vessel.

From this sentence, the libellants appealed to the circuit court, where it was reversed, on the 28th of October, 1811.

From this sentence of reversal, the district attorney appealed to this court.

Dallas, attorney of the United States, for the district of Pennsylvania, and *Pinkney*, for the claimant.

Harper and *Hare*, contrà.

[*135] * Marshall, C. J., delivered the opinion of the court, as follows:

This case involves the very delicate and important inquiry, whether an American citizen can assert, in an American court, a title to an armed national vessel, found within the waters of the United States.

The question has been considered with an earnest solicitude, that the decision may conform to those *principles of [*136] national and municipal law by which it ought to be regulated.

In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this.

The jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage, and by common opinion, growing out of that usage.

*A nation would justly be considered as violating its faith, [*137] although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can

be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation.

1st. One of these is admitted to be the exemption of the person of the sovereign from arrest or detention within a foreign territory.

If he enters that territory with the knowledge and license of its sovereign, that license, although containing no stipulation exempting his person from arrest, is universally understood to imply such stipulation.

Why has the whole civilized world concurred in this construction? The answer cannot be mistaken. A foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation, and it is to [*138] avoid this *subjection that the license has been obtained.

The character to whom it is given, and the object for which it is granted, equally require that it should be construed to impart full security to the person who has obtained it. This security, however, need not be expressed; it is implied from the circumstances of the case.

Should one sovereign enter the territory of another, without the consent of that other, expressed or implied, it would present a question which does not appear to be perfectly settled, a decision of which is not necessary to any conclusion to which the court may come in the cause under consideration. If he did not thereby expose himself to the territorial jurisdiction of the sovereign, whose dominions he had entered, it would seem to be because all sovereigns impliedly engage not to avail themselves of a power over their equal, which a romantic confidence in their magnanimity has placed in their hands.

2d. A second case, standing on the same principles with the first, is the immunity which all civilized nations allow to foreign ministers.

Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction suppose him to be extra-territorial, and, therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still, the immunity itself is granted

by the governing power of the nation to which the minister is deputed. This fiction of ex-territoriality could not be erected and supported against the will of the sovereign of the territory. He is supposed to assent to it.

This consent is not expressed. It is true that in some countries, and in this among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess.

The assent of the sovereign to the very important and extensive exemptions from territorial jurisdiction *which are [*139] admitted to attach to foreign ministers, is implied from the considerations that, without such exemption, every sovereign would hazard his own dignity by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission. A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and, therefore, a consent to receive him, implies a consent that he shall possess those privileges which his principal intended he should retain — privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform.

In what cases a minister, by infracting the laws of the country in which he resides, may subject himself to other punishment than will be inflicted by his own sovereign, is an inquiry foreign to the present purpose. If his crimes be such as to render him amenable to the local jurisdiction, it must be because they forfeit the privileges annexed to his character; and the minister, by violating the conditions under which he was received as the representative of a foreign sovereign, has surrendered the immunities granted on those conditions; or, according to the true meaning of the original assent, has ceased to be entitled to them.

3d. A third case in which a sovereign is understood to cede a portion of his territorial jurisdiction is, where he allows the troops of a foreign prince to pass through his dominions.

In such case, without any express declaration waiving jurisdiction over the army to which this right of passage has been granted, the sovereign who should attempt to exercise it would certainly be considered as violating his faith. By exercising it, the purpose for which the free passage was granted would be defeated, and a portion of the military force of a foreign independent nation would be diverted from those national objects and duties to which it was applicable, and

would be withdrawn from the control of the sovereign whose
[*140] power and whose safety might greatly depend on *retaining
the exclusive command and disposition of this force. The grant of a free passage, therefore, implies a waiver of all jurisdiction over the troops during their passage, and permits the foreign general to use that discipline, and to inflict those punishments which the government of his army may require.

But if, without such express permit, an army should be led through the territories of a foreign prince, might the jurisdiction of the territory be rightfully exercised over the individuals composing this army?

Without doubt, a military force can never gain immunities of any other description than those which war gives, by entering a foreign territory against the will of its sovereign. But if his consent, instead of being expressed by a particular license, be expressed by a general declaration that foreign troops may pass through a specified tract of country, a distinction between such general permit and a particular license is not perceived. It would seem reasonable that every immunity which would be conferred by a special license, would be in like manner conferred by such general permit.

We have seen that a license to pass through a territory implies immunities not expressed, and it is material to inquire why the license itself may not be presumed?

It is obvious that the passage of an army through a foreign territory will probably be at all times inconvenient and injurious, and would often be imminently dangerous to the sovereign through whose dominion it passed. Such a practice would break down some of the most decisive distinctions between peace and war, and would reduce a nation to the necessity of resisting by war, an act not absolutely hostile in its character, or of exposing itself to the stratagems and frauds of a power whose integrity might be doubted, and who might enter the country under deceitful pretexts. It is for reasons like these that the general license to foreigners to enter the dominions of a friendly power, is never understood to extend to a military force; and an army marching into the dominions of another sovereign, may justly be considered as committing an act of hostility; and, if not
opposed by force, acquires no privilege by its irregular and
[*141] *improper conduct. It may, however, well be questioned
whether any other than the sovereign power of the State be capable of deciding that such military commander is without a license.

But the rule which is applicable to armies, does not appear to be equally applicable to ships of war entering the ports of a friendly power. The injury inseparable from the march of an army through an inhabited country, and the dangers often, indeed generally, at-

tending it, do not ensue from admitting a ship of war, without special license, into a friendly port. A different rule therefore, with respect to this species of military force, has been generally adopted. If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, and they are supposed to enter such ports, and to remain in them while allowed to remain, under the protection of the government of the place.

In almost every instance, the treaties between civilized nations contain a stipulation to this effect in favor of vessels driven in by stress of weather or other urgent necessity. In such cases, the sovereign is bound by compact to authorize foreign vessels to enter his ports. The treaty binds him to allow vessels in distress to find refuge and asylum in his ports, and this is a license which he is not at liberty to retract. It would be difficult to assign a reason for withholding from a license, thus granted, any immunity from local jurisdiction which would be implied in a special license.

If there be no treaty applicable to the case, and the sovereign, from motives deemed adequate by himself, permits his ports to remain open to the public ships of foreign friendly powers, the conclusion seems irresistible, that they enter by his assent. And if they enter by his assent necessarily implied, no just reason is perceived by the court for distinguishing their case from that of vessels which enter by express assent.

*In all the cases of exemption which have been reviewed, [*142] much has been implied, but the obligation of what was implied has been found equal to the obligation of that which was expressed. Are there reasons for denying the application of this principle to ships of war?

In this part of the subject a difficulty is to be encountered, the seriousness of which is acknowledged, but which the court will not attempt to evade.

Those treaties which provide for the admission and safe departure of public vessels entering a port from stress of weather, or other urgent cause, provide in like manner for the private vessels of the nation; and where public vessels enter a port under the general license which is implied merely from the absence of a prohibition, they are, it may be urged, in the same condition with merchant vessels entering the same port for the purposes of trade who cannot thereby claim any exemption from the jurisdiction of the country. It may be contended,

certainly with much plausibility if not correctness, that the same rule and same principle are applicable to public and private ships; and since it is admitted that private ships entering without special license become subject to the local jurisdiction, it is demanded on what authority an exception is made in favor of ships of war.

It is by no means conceded that a private vessel, really availing herself of an asylum provided by treaty, and not attempting to trade, would become amenable to the local jurisdiction, unless she committed some act forfeiting the protection she claims under compact. On the contrary, motives may be assigned for stipulating and according immunities to vessels in cases of distress, which would not be demanded for or allowed to those which enter voluntarily and for ordinary purposes. On this part of the subject, however, the court does not mean to indicate any opinion. The case itself may possibly occur, and ought not to be prejudged.

Without deciding how far such stipulations in favor of distressed vessels, as are usual in treaties, may exempt private ships from the jurisdiction of the place, it may safely be asserted, that the whole reasoning upon which such exemption has been implied in
[*143] other cases, * applies with full force to the exemption of ships of war in this.

"It is impossible to conceive," says Vattel, "that a prince who sends an ambassador or any other minister can have any intention of subjecting him to the authority of a foreign power; and this consideration furnishes an additional argument, which completely establishes the independency of a public minister. If it cannot be reasonably presumed that his sovereign means to subject him to the authority of the prince to whom he is sent, the latter, in receiving the minister, consents to admit him on the footing of independency; and thus there exists between the two princes a tacit convention, which gives a new force to the natural obligation."

Equally impossible is it to conceive, whatever may be the construction as to private ships, that a prince who stipulates a passage for his troops, or an asylum for his ships of war in distress, should mean to subject his army or his navy to the jurisdiction of a foreign sovereign. And if this cannot be presumed, the sovereign of the port must be considered as having conceded the privilege to the extent in which it must have been understood to be asked.

To the court it appears, that where, without treaty, the ports of a nation are open to the private and public ships of a friendly power, whose subjects have also liberty without special license, to enter the country for business or amusement, a clear distinction is to be drawn between the rights accorded to private individuals or private trading

vessels, and those accorded to public armed ships which constitute a part of the military force of the nation.

The preceding reasoning has maintained the propositions that all exemptions from territorial jurisdiction must be derived from the consent of the sovereign of the territory; that this consent may be implied or expressed; and that, when implied, its extent must be regulated by the nature of the case, and the views under which the parties requiring and conceding it must be supposed to act.

* When private individuals of one nation spread themselves through another as business or caprice may direct, [*144] mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter, can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port, may reasonably be construed, and it seems to the court ought to be construed, as containing an exemption from the jurisdiction of the sovereign, within whose territory she claims the rights of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly in practice, nations have not yet asserted their jurisdiction over the public armed ships of a foreign sovereign entering a port open for their reception.

Bynkershoek, a jurist of great reputation, has indeed maintained that the property of a foreign sovereign is not distinguishable by any legal exemption from the *property of an ordi- [*145]

nary individual, and has quoted several cases in which courts have exercised jurisdiction over causes in which a foreign sovereign was made a party defendant.

Without indicating any opinion on this question, it may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do with respect to any portion of that armed force which upholds his crown, and the nation he is entrusted to govern.

The only applicable case cited by Bynkershoek, is that of the Spanish ships of war seized in Flushing, for a debt due from the king of Spain. In that case, the states-general interposed; and there is reason to believe, from the manner in which the transaction is stated, that, either by the interference of government, or the decision of the court, the vessels were released.

This case of the Spanish vessels is, it is believed, the only case furnished by the history of the world, of an attempt made by an individual to assert a claim against a foreign prince, by seizing the armed vessels of the nation. That this proceeding was at once arrested by the government, in a nation which appears to have asserted the power of proceeding in the same manner against the private property of the prince, would seem to furnish no feeble argument in support of the universality of the opinion in favor of the exemption claimed for ships of war. The distinction made in our own laws between public and private ships would appear to proceed from the same opinion.

It seems, then, to the court, to be a principle of public law, that national ships of war, entering the port of a friendly power
[*146] open for their reception, are to be considered *as exempted by the consent of that power from its jurisdiction.

Without doubt, the sovereign of the place is capable of destroying this implication. He may claim and exercise jurisdiction either by employing force, or by subjecting such vessels to the ordinary tribunals. But until such power be exerted in a manner not to be misunderstood, the sovereign cannot be considered as having imparted to the ordinary tribunals a jurisdiction, which it would be a breach of faith to exercise. Those general statutory provisions therefore which are descriptive of the ordinary jurisdiction of the judicial tribunals,

which give an individual whose property has been wrested from him, a right to claim that property in the courts of the country in which it is found, ought not, in the opinion of this court, to be so construed as to give them jurisdiction in a case, in which the sovereign power has impliedly consented to waive its jurisdiction.

The arguments in favor of this opinion which have been drawn from the general inability of the judicial power to enforce its decisions in cases of this description, from the consideration that the sovereign power of the nation is alone competent to avenge wrongs committed by a sovereign, that the questions to which such wrongs give birth are rather questions of policy than of law, that they are for diplomatic rather than legal discussion, are of great weight, and merit serious attention. But the argument has already been drawn to a length which forbids a particular examination of these points.

The principles which have been stated, will now be applied to the case at bar.

In the present state of the evidence and proceedings, The Exchange must be considered as a vessel, which was the property of the libellants, whose claim is repelled by the fact that she is now a national armed vessel, commissioned by, and in the service of the emperor of France. The evidence of this fact is not controverted. But it is contended that it constitutes no bar to an inquiry into the validity of the title, by which the emperor holds this vessel. Every person, it is alleged, who is entitled to property brought within the jurisdiction of our courts, has a *right to assert his title in [*147] those courts, unless there be some law taking his case out of the general rule. It is therefore said to be the right, and if it be the right, it is the duty of the court, to inquire whether this title has been extinguished by an act, the validity of which is recognized by national or municipal law.

If the preceding reasoning be correct, The Exchange being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that, while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

If this opinion be correct, there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States.

I am directed to deliver it, as the opinion of the court, that the

sentence of the circuit court, reversing the sentence of the district court, in the case of The Exchange be reversed, and that of the district court, dismissing the libel, be affirmed.

1 W. 238; 7 W. 283.

ARCHIBALD FREELAND *v.* HERON, LENOX, & Co.

7 C. 147.

An account-current sent by a foreign merchant to a merchant in this country, and not objected to for two years, is deemed an account stated, and throws the burden of proof upon him who received and kept it without objection.

THIS cause having been argued by *Winder*, for the appellant, and *P. B. Key*, for the appellees, — all the judges being present,

DUVALL, J., delivered the opinion of the court as follows:

[* 148] * This case comes up by appeal from the decree of the circuit court for the district of Virginia.

The record presents the following state of facts: A bill in equity was filed by Heron, Lenox, & Co. against Archibald Freeland, the appellant, in the circuit court in the month of December, 1798. It states that the company consisted of Nathaniel Heron, a subject of Great Britain, Samuel Lenox, also a subject of Great Britain, and James Freeland, and William Gillin. That articles of copartnership between the said company and Archibald Freeland, of Virginia, were entered into on the 15th of February, 1789, to commence on the first day of April following, and to continue for five years unless sooner dissolved by mutual consent. It is stipulated by the articles that the business of the copartnership should be managed and carried on in the town of Manchester, in Virginia, by Archibald Freeland, under the firm of James Freeland. That there should be no advance put on the goods furnished but the charges and commission in Britain, and that all bounties, discounts, and abatements which might be received, should be credited. The complainants in their bill further state that Archibald Freeland had the sole management of the affairs of the company, and the care and custody of the books and funds.

That during the existence of the copartnership, Heron, Lenox, & Co. remitted to James and A. Freeland goods, wares, and merchandise, to the amount of several thousand pounds sterling, and had

received some payments, but that a considerable balance remained due to them on account of those remittances; that J. and A. Freeland had been frequently called on to account and pay the balance due. That the firm of J. and A. Freeland had been long since dissolved by mutual consent; and that A. Freeland, retaining all the books and effects of the company, had refused to account and pay the balance due; and they pray relief.

To this bill, A. Freeland filed his answer, admitting the copartnership, as stated, and that the business of the concern had been conducted by him at Manchester, until the 10th day of April, 1795, when by contract the whole of the property of the copartnery was vested in *him for his own use and benefit upon the condi- [*149] tions therein expressed; and he insists that, upon a fair settlement of the accounts between the complainants and him, agreeably to the custom of merchants in London, as stipulated by the said contract, he owes nothing.

It further appears that shipments of merchandise by Heron, Lenox, & Co. were made from time to time, during the first four years of the concern, amounting in the whole to more than 19,000*l.* sterling, and that remittances were made by A. Freeland in bills of exchange and country produce during the same period to a large amount; and that in the year 1793 the partnership was dissolved by mutual consent. A. Freeland continued to settle and liquidate the accounts of the firm at Manchester; and in September, 1796, wrote a letter to Freeland and Gillin, of which the following is an extract: "Your claim will be among the first of my debts that is paid — for the indulgence I have met with, I have to thank you, and mean to exert myself in order to pay off the whole as early as possible."

During the pendency of this suit in the circuit court, a cross bill was filed by A. Freeland against Heron, Lenox, & Co. for discovery, which they answered by denying the allegations in the bill without disclosing the evidence sought for. No exception, however, was taken to the answer.

An order had passed directing an account to be stated by a commissioner appointed for the purpose, who reported that there was due from A. Freeland to Heron, Lenox, & Co. a balance of 1,160*l.* 17*s.* 10*d.* sterling, to which report various exceptions were taken by the defendant.

On the 14th of December, 1809, the cause came on to be heard in the circuit court upon the bill, answer, and exhibits, and the report of the commissioner; when it was adjudged, ordered, and decreed that the defendant, A. Freeland, pay to the plaintiffs, Heron, Lenox, & Co. the sum reported to be due by the commissioner, at certain specified

periods, with interest from the first day of June, 1798, and
[*150] costs; and the cross bill was *dismissed with costs. From
which decree the defendant appealed.

The exceptions taken to the report of the commissioner in the court below have been urged on the part of the appellant in this court, and may be comprised under the following heads:

1. That he has not given the defendant credit for all the bounties, drawbacks, and duties which were allowed to the complainants on the purchase and shipment of the goods in England, which he ought to have allowed agreeably to the contract of copartnership.

2. That the commissioner adopted a mode of calculating interest contrary to the agreement of the parties in April, 1795, and prejudicial to the defendant.

3. That he allowed the complainants a commission on the sales of produce shipped directly to Cadiz, Lisbon, and other places, where the property was consigned directly to persons residing in those several places; by them sold, and who charged the ordinary commission, and who remitted the proceeds to the complainants, in London.

4. That he has not given credit to the defendant for twenty-five hogsheads of tobacco.

There was another exception, but as it was abandoned in the argument by the counsel, it will not be noticed.

With respect to the first, third, and fourth exceptions, the record does not furnish the evidence necessary to enable the court to form a correct decision from the facts. The positive assertions of the appellant are denied by the appellees; and in proof both are equally defective.

The appellant claims a credit of 764*l.* 10*s.* 5*d.* sterling on account of bounties, drawbacks, and discounts; he has been allowed upwards of 300*l.* sterling, and the appellees deny that he is entitled to more
credit than is given, averring that more has not been re-
[*151] ceived by *them. Each insists that the *onus probandi* ought
to be thrown on his adversary.

It is proper to observe that it appears by the record that Heron, Lenox, & Co. furnished A. Freeland with an account current annually for the first four years of their transactions, and that no objection was made to them. This circumstance, combined with the promise contained in A. Freeland's letter of September, 1796, to pay the whole balance due, affords room for the application of the rule of the chancery court and of merchants to decide the controversy. It is this: When one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be

deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him.

The same rule is applicable to the third exception. After an acquiescence of several years the account is considered as binding upon him, as he has failed to falsify the allegations of the appellees that the shipments of produce to Cadiz, Lisbon, and Bourdeaux were made pursuant to their orders and under their superintendence.

He has failed also to prove that he is entitled to the credit insisted on in his fourth exception. To be entitled to the credit it is incumbent on him to prove that the twenty-five hogsheads are exclusive of the eighty hogsheads of tobacco shipped in The Mercury. The record affords no testimony whatever.

With respect to the second exception, it is considered by this court that the circuit court erred in sustaining the report of the commissioner as to the manner of stating the account between the parties. The commissioner adopted the mode established in Virginia, and which it is believed prevails generally throughout the United States; but by the written agreement of the parties in April, 1795, it is stipulated that the interest shall be charged agreeably to the custom and manner of settling accounts in London. In all other respects the opinion of the circuit court is affirmed.

*It is therefore the opinion of this court, that the decree [*152] of the circuit court with respect to the second exception be reversed, and that the cause be remanded to the circuit court, in order that an account may be taken pursuant to the written agreement of the parties — agreeably to the custom and manner of settling accounts in London.

WELCH *v.* MANDEVILLE.

7 C. 152.

The refusal of the court below to reinstate a cause which has been legally dismissed, is no ground for a writ of error.

ERROR to the circuit court for the District of Columbia.

The defendant in action of covenant having produced a release and an order to the clerk of the court, signed by the plaintiff, to dismiss the action, a nonsuit was entered. Subsequently, a motion was made by the plaintiff's attorney to reinstate it, and overruled by the court. Which refusal to reinstate the action, was assigned for error.

E. J. Lee, for the plaintiff.

Swann, for the defendant.

[* 155] * MARSHALL, C. J. The majority of the court is of opinion that the motion to reinstate the cause, was an application to the discretion of the court, and its refusal is not a ground for a writ of error.

After the court had delivered this opinion, it became a question whether the writ of error should be dismissed, or the judgment affirmed.

After the consideration of the case again,

[* 156] * MARSHALL, C. J., stated it to be the opinion of the court, that the judgment of the court below should be affirmed. The writ of error is to the judgment generally. The refusal to reinstate the cause being no error in law, the court can see no error in the principal judgment.

Judgment affirmed.

MARSTELLER and others *v.* M'CLEAN.

7 C. 156.

In order to avoid the plea of the statute of limitations to an action by joint tenants, it is necessary to show that all the plaintiffs were under a disability to sue.

ERROR to the circuit court for the District of Columbia. The substance of the pleadings on which the case was decided, is stated in the opinion of the court.

C. Simms, and *R. I. Taylor*, for the plaintiff.

E. J. Lee, for the defendant.

[* 158] * STORY, J., delivered the opinion of the court, as follows: The plaintiffs in error brought an action of trespass *quare clausum fregit*, to which the defendant in error pleaded the statute of limitations. The replication in substance states that, at the time when

the cause of action accrued, Christiana, wife of one of the plaintiffs, and Elizabeth, wife of another of the plaintiffs, "were *feme coverts*, and ever since have continued *feme coverts*," and "that Kitty Hunter," one of the plaintiffs, "was a *feme covert;*" and that the other plaintiffs in whose right the suit was brought, at the time when the action accrued, and also at the commencement of the suit, were infants. To this replication there is a general demurrer and joinder on which the court below gave judgment for the defendant.

It is contended by the defendant that this replication is insufficient, inasmuch as it does not allege that Kitty Hunter continued a *feme covert* until within five years, the time prescribed by the statute of limitations for the pursuit of this remedy. And it is further contended, that, even if the replication be good, yet the plaintiffs ought not to recover, because the declaration charges the trespass by way of recital, "for that whereas the defendant, with force and arms," &c., and not by positive and direct allegations as the law requires. On this last exception the court do not intend to give any opinion; but unless the point were fully settled by authority, they would feel little inclination to sustain an objection which would seem directed more to the form than the merits of the action.

The objection to the replication deserves more consideration. It is certainly a rule of pleading that a replication should of itself contain a full and complete answer to the bar, and that a joint plea which is bad, affects with its consequences all the parties joining in it. *In the present case it may be true that Kitty [*159] Hunter was a *feme covert* at the time when the action accrued; and yet it may be equally true that five years have elapsed since the disability was removed. It was therefore incumbent on the plaintiffs, not barely to show a coverture, but, by a proper averment, to show its continuance to a time within which it would have been a perfect avoidance of the bar. The objection then would have been fatal in a several action brought by Kitty Hunter.

But it is said that though the replication be bad as to one of the plaintiffs, yet it can only bar her; that the infancy or coverture of the other plaintiffs entitles them to a recovery in this action for the injury done to them; and that, as parceners and tenants in common, are compellable to join in actions of this nature, it would be hard to affect them with the disability of a cotenant.

It seems, however, to be a settled rule, that all the plaintiffs in a suit must be competent to sue, otherwise the action cannot be supported; and the case of Perry *v.* Jackson, cited from 4 Term Reports, 516, decides that a plea of the statute of limitations, which is good as to one partner, bars them both in a joint action. When once

the statute runs against one of two parties entitled to a joint action, it operates as a bar to such joint action.

It is therefore the opinion of the court that, as this answer to the objection fails, the replication must be adjudged insufficient, and of course the bar must prevail.

Judgment affirmed.

2 W. 316; 5 H. 283.

WELCH *v.* LINDO.

7 C. 159.

The mere possession of a promissory note by an indorsee, who has indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a reassignment or receipt from the last indorsee. An indorsement "without recourse," is not evidence of money had and received by the indorser to the use of the indorsee.

ERROR to the circuit court for the District of Columbia. The case is stated in the opinion of the court.

E. J. Lee, for the plaintiff.

Swann, and *Jones*, for the defendant.

[*162] * MARSHALL, C. J., delivered the following opinion of the court:

This was an action brought by the plaintiff against the defendant, in the circuit court for the county of Alexandria. The declaration contained two counts. The first was special, and the second for money had and received, by the defendant to the plaintiff's use.

At the trial of the cause, the plaintiff gave in evidence, the record of the proceedings in a court in the State of Kentucky, in a cause in which William Hodgsett, assignee of James Welch, who was assignee of Abraham Lindo, was plaintiff, and John Kerchevel was defendant. This suit was instituted on a promissory note.

[* 163] The defendant pleaded payment to Lindo. Issue * was joined on this plea, and a verdict was found for the defendant. The plaintiff also produced the original note with the indorsements thereon, the last of which was an assignment made by him to Hodgsett.

On the prayer of the defendant, the court decided that this evidence was not, in itself, sufficient to support the action on the second count, and to this opinion the counsel for the plaintiff excepted.

The testimony offered by the plaintiff, was certainly incompetent of itself to prove that the defendant had received money to his use. The mere possession of a note which he had assigned to another could not, while that assignment remained, be evidence that the note was his property. Some reassignment or receipt from the last assignee was necessary while the indorsements remained to prove that the title against the prior indorser was in him, and that he had paid a sum of money which gave him a claim on that indorser. And if the record of the State of Kentucky could prove that Lindo had received the money due upon the note, it would not prove that he had received it to the use of the plaintiff. Nor, under this indorsement, which is an assignment of the note without expressing value received, and that, too, without recourse against the assignor, can it be fairly inferred that the nominal value of the note was actually paid.

There is, then, no error in the direction given by the circuit court.

On the first count, there was a verdict for the plaintiff, but judgment was arrested, because that count was insufficient in law.

This count states, that a promissory note was made by John Kercheval, payable to Abraham Lindo; that Lindo indorsed that note to the plaintiff, in these words, "pay the within to James Welch, or order, without any recourse whatever on A. Lindo." That the plaintiff indorsed the said note to William Hodgsett, who instituted a suit thereon, in which the said Kercheval pleaded, that he had paid the debt to Abraham Lindo. A verdict was found for the defendant, on which a judgment * was rendered, which re- [* 164] mains in full force. By these proceedings, the plaintiff became liable to pay the said Hodgsett the amount of the said note and costs of suit, which he had actually paid. The declaration then proceeds to state, that, by reason of the premises, the defendant, Abraham Lindo, became liable to pay the plaintiff the amount of the said note and costs of suit, and being so liable, he assumed, &c.

Under the mere assignment from Lindo to Welch, it is clear that this suit is not sustainable; because it is a part of the contract, that Lindo shall not be liable under his indorsement. The count is also defective, in not stating that the indorsement was made on a valuable consideration, and also in not averring that Lindo had actually received the money for which the note was given.

These are substantial faults, which are not cured by a verdict. The declaration presents a case in which there was no liability on

the part of the defendant, to the plaintiff, which can sustain the assumpsit found by the verdict.

There is no error, and the judgment is affirmed.

The State of New Jersey v. Wilson.

7 C. 164.

A legislative act passed in consideration of a release of title by the Indians, declaring that certain lands which should be purchased for the Indians, should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act. Such repealing act being void under that clause of the Constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts.

This case was submitted to this court, upon a statement of facts, without argument.

Marshall, C. J., delivered the opinion of the court, as follows:

This is a writ of error to a judgment rendered in the court of last resort, in the State of New Jersey, by which the plaintiffs allege they are deprived of a right secured to them by the Constitution of the United States.

[*165] *The case appears to be this:

The remnant of the tribe of Delaware Indians, previous to the 20th February, 1758, had claims to a considerable portion of lands in New Jersey, to extinguish which became an object with the government and proprietors under the conveyance from King Charles II. to the Duke of York. For this purpose a convention was held in February, 1758, between the Indians and commissioners appointed by the government of New Jersey, at which the Indians agreed to specify particularly the lands which they claimed, release their claim to all others, and to appoint certain chiefs to treat with commissioners on the part of the government for the final extinguishment of their whole claim.

On the 9th of August, 1758, the Indian deputies met the commissioners, and delivered to them a proposition reduced to writing — the basis of which was, that the government should purchase a tract of land on which they might reside — in consideration of which they would release their claim to all other lands in New Jersey south of the River Raritan.

This proposition appears to have been assented to by the commissioners; and the legislature, on the 12th of August, 1758, passed an act to give effect to this agreement.

This act, among other provisions, authorizes the purchase of lands for the Indians, restrains them from granting leases or making sales, and enacts "that the lands to be purchased for the Indians aforesaid shall not hereafter be subject to any tax, any law, usage, or custom to the contrary thereof, in anywise notwithstanding."

In virtue of this act, the convention with the Indians was executed. Lands were purchased and conveyed to trustees for their use, and the Indians released their claim to the south part of New Jersey.

The Indians continued in peaceable possession of the lands thus conveyed to them, until some time in the year 1801, when, having become desirous of migrating from *the State of [*166] New Jersey, and of joining their brethren at Stockbridge, in the State of New York, they applied for, and obtained an act of the legislature of New Jersey, authorizing a sale of their land in that State.

This act contains no expression in any manner respecting the privilege of exemption from taxation which was annexed to those lands by the act, under which they were purchased and settled on the Indians.

In 1803, the commissioners under the last-recited act sold and conveyed the lands to the plaintiffs, George Painter and others.

In October, 1804, the legislature passed an act repealing that section of the act of August, 1758, which exempts the lands therein mentioned from taxes. The lands were then assessed, and the taxes demanded. The plaintiffs thinking themselves injured by this assessment, brought the case before the courts in the manner prescribed by the laws of New Jersey, and in the highest court of the State, the validity of the repealing act was affirmed, and the land declared liable to taxation. The cause is brought into this court by writ of error, and the question here to be decided is, does the act of 1804 violate the Constitution of the United States.

The Constitution of the United States declares that no State shall "pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts."

In the case of Fletcher *v.* Peck, 6 Cranch, 87, it was decided in this court on solemn argument and much deliberation, that this provision of the Constitution extends to contracts to which a State is a party, as well as to contracts between individuals. The question then is narrowed to the inquiry whether, in the case stated, a contract existed, and whether that contract is violated by the act of 1804.

Every requisite to the formation of a contract is found in the proceedings between the then colony of New Jersey and the Indians. The subject was, a purchase on the part of the government of extensive claims of the Indians, the extinguishment of which would quiet the title to a large portion of the province. A propo-
[*167] sition to this effect is made, the terms stipulated, the *consideration agreed upon, which is a tract of land with the privilege of exemption from taxation; and then, in consideration of the arrangement previously made, one of which this act of assembly is stated to be, the Indians execute their deed of cession. This is certainly a contract clothed in forms of unusual solemnity. The privilege, though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.

It is not doubted but that the State of New Jersey might have insisted on a surrender of this privilege as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the State, with all its privileges and immunities. The purchaser succeeds, with the assent of the State, to all the rights of the Indians. He stands, with respect to this land, in their place, and claims the benefit of their contract. This contract is certainly impaired by a law which would annul this essential part of it.

4 P. 514; 6 P. 691; 12 P. 657; 16 P. 281; 6 H. 301, 507; 16 H. 369.

KING *v.* RIDDLE.

7 C. 168.

A recital in the defendant's deed, that the plaintiff and others had paid the defendant's debt, the repayment of which the defendant desired to secure to him, is evidence from which the jury may infer that the payment was at the defendant's request, and is also sufficient to take the debt out of the Statute of Limitations.

Under the act of January 6, 1800, for the relief of insolvent debtors, (2 Stats. at Large, 4,) the debt is not discharged.

ERROR to the circuit court for the District of Columbia, in an action of assumpsit for money paid. The general issue and the Statute of Limitations were pleaded. Among the evidence introduced by

the plaintiff was a deed of the defendant, which recited that the plaintiff and others became his sureties for a debt, and paid it, and that the defendant being desirous to secure his sureties, thereby assigned property in trust to be distributed equally among them. The defendant gave in evidence a certificate of his discharge from imprisonment, under the act of January 6, 1800, (2 Stats. at Large, 4.) The errors assigned appear in the opinion of the court.

E. J. Lee, for the plaintiff.

Swann, for the defendant.

* MARSHALL, C. J., delivered the opinion of the court, to [*170] the following effect:

In this case the whole evidence is spread upon the record by the bill of exceptions, and the court below refused to instruct the jury (as requested by the defendant) that it was not sufficient in law to enable the plaintiff to recover in this action.

If the court ought to have given this instruction their refusal is certainly error.

The evidence shows that a note was given, or money paid by the plaintiff for the use of the defendant; but *it is ob- [*171] jected that it was not paid at the request of the defendant. If the plaintiff was not bound to pay it, and if it was paid without the request of the defendant, it is certain that the plaintiff is not entitled to recover. But the court thinks that the recital in the deed of assignment is evidence from which the jury might infer a request.

The court is also of opinion that the recital in the deed is sufficient to take the case out of the Statute of Limitations. Although the court is not willing to extend the effect of casual or accidental expressions farther than it has been, to take a case out of that statute, and although the court might be of opinion that the cases on that point have gone too far, yet this is not a casual or incautious expression; the deed admits the debt to be due on the 15th of July, 1804, and five years had not afterwards elapsed before the suit was brought.

Then it is objected that there is no evidence of the payment of the money by the plaintiff; but the court thinks that the recital of the deed is evidence from which the jury might infer the payment.

There was no error respecting the discharge under the insolvent act. It was only a discharge of the person, and could not affect the judgment.

Judgment affirmed.

Davy's Executors v. Faw.

7 C. 171.

An award will not be set aside in equity on account of an omission by the arbitrators to act upon part of the matters submitted, unless that omission shall have injured the complainant.

When the price of land and not the question of title, is submitted, the submission and award need not be by deed.

This case is sufficiently stated in the following opinion, delivered by Marshall, C. J. This is an appeal from a decree of the circuit court for the county of Alexandria, sitting in chancery, by which that court set aside an award made between the parties, and directed an account.

[*172] *The bill impeaches the award, because,

1. The arbiters exceeded their power.

2. They made no award with respect to a part of the matter submitted to them.

3. They were partial, and proceeded to make their award without hearing the party against whom it was made.

The arbitration bond binds the parties to submit to the award, order, and arbitrament of Francis Peyton, Theophilus Harris, and Thomas Herbert, or any two of them, respecting a controversy of several accounts and contracts existing between them.

A judgment at law has been obtained for the amount of the award; for relief against which and against the award itself this suit was instituted.

By the plaintiffs in error it is contended, that excess of power in arbiters is a defence at law, and is therefore not examinable in this court.

That the injured party may avail himself of this defence in a court of law, where the excess of power is apparent on the face of the award, is not controverted. But, in this case, it is not shown by the award itself, and the defendant insists that he was not at liberty, in a court of law, to avail himself of evidence *dehors* the award; and in support of this opinion the case of Wills *v.* Maccarmick, 2 Wilson, 149, has been much relied upon. Without deciding that question, the court will proceed to inquire whether the defendant in error has succeeded in proving that, in this case, the arbiters have, in fact, exceeded their power.

It appears that Abraham Faw sold to David Davy a lot of ground,

the purchase-money for which was payable in four years, in four equal annual payments. Davy conveyed to Faw, about the same time, a lot which he had purchased from Elisha C. Dick, and which he held on the condition of making certain improvements. Davy becoming insolvent, it was agreed that his *contract with [*173] Faw should be annulled, that the bonds he had given Faw for the purchase of the lot should be returned to him, and that he should surrender the bond for a title which Faw had executed. It had been stipulated that, in the event of his failing to pay the purchase-money, and of the contract being avoided, the money actually paid by Davy to Faw should be considered as rent so far as rent was allowed. There had been some other dealings between the parties, and there had been a small piece of ground rented to Davy, on which he had put some inconsiderable improvements.

In this state of things they agreed to submit their affairs to arbitration, and the bond was executed which has been stated. The arbiters awarded that Faw should pay Davy 314*l.* 4*s.* 11*d.*, and it is proved that, in making up the account between the parties, they debited Faw with 300*l.* for the lot which had been conveyed to him by Davy. Faw contends that this was not a contract subsisting between the parties, and consequently is not included within the terms of the submission.

Faw alleges in his bill that this whole transaction was closed: that the lot conveyed to him by Davy formed no part of the consideration given for the lot he had sold, but was conveyed to him, because Davy considered the rent reserved on that lot and the conditions of improvement, which were inserted in the deed, as equivalent to its full value. These allegations are denied in the answer; and the defendant avers that the price of the lot purchased by him was 500*l.*; that he conveyed the lot he had purchased from Dick at 100*l.*, and gave his bonds for 400*l.*, the residue of the purchase-money; that, when this contract was annulled, he became entitled to his lot or to its value, and that this was one of the subjects submitted to the referees.

In addition to this testimony furnished by the answer, the defendant has produced the testimony of a witness who was present when the arbitration was agreed upon and the bond executed. He says that the lot purchased by the defendant from the plaintiff, and that which had been conveyed by the defendant to the plaintiff, as well as other accounts between the parties, formed the subjects of conversation.

*Francis Peyton, one of the arbiters, declares that he con- [*174] sidered all the transactions between Faw and Davy as

submitted to them; that Faw himself laid before them the bond he had given to Davy for a conveyance of the lot he had sold, and that he always understood from Mr. Faw during the arbitration that he was willing to pay 100*l.* for the lot conveyed to him by Davy. Peyton adds that the mode adopted by the arbiters for arranging that part of the subject, was understood by them to be the one which was most agreeable to Mr. Faw.

The court is of opinion that the plaintiff in the court below has failed in showing that the arbiters have exceeded their powers.

2. A second objection to this award is, that the arbiters have not settled the accounts between the parties for flour stored by Faw for Davy, which accounts were clearly within the submission.

The defendant has not shown that he is injured by this omission, and it is, therefore, unnecessary to decide whether, had he been injured, a court of equity could or could not have afforded relief.

3. A third ground, on which the application for relief is placed, is the partiality and improper conduct of the arbiters.

That judges chosen by the parties themselves as well as those who are constituted by law, ought to be exempt from all imputation of partiality or corruption; that their conduct ought to be fair, and their proceedings regular, so as to give the parties an opportunity to be heard, and themselves the means of understanding the subjects they are to decide, are propositions not to be controverted. But corrupt motives are not lightly to be ascribed to the arbiter, nor is partiality to be attributed to him on account of difference of opinion with respect to the decision he has made.

The charge made in this case, that the parties were not sufficiently heard, is not supported, and is contradicted by the testimony [* 175] in the cause. The general *charge of partiality is also contradicted, and is expressly denied by the arbiters, who have been made defendants, and by the deposition of Francis Peyton, who did not sign the award.

Some particular facts have been proved, by which this charge, it is supposed by the counsel for the defendant in error, may be supported.

M'Kinsey Talbot deposes, that after the arbiters had separated, Thomas Herbert, who was one of them, said that David Davy ought to buy his winter's meat for him without making any charge, on account of the particular service he had rendered him in the said arbitration.

That such language is unbecoming in a judge will not be denied; and if the circumstances leading to these expressions, and the manner in which they were uttered, had been stated in the record, and

there had been reason to believe that the words were spoken seriously, they would have furnished objections to the award not easily to be removed. But nothing is stated which could give these expressions a serious aspect. They appear not to have been delivered confidentially; and as it is difficult to conceive that a man, who could be chosen as an arbiter, would thus wantonly and unnecessarily expose the depravity of his own conduct, the court must consider these words as spoken in sport, with indiscreet levity, but not as seriously indicative of an opinion that he had made an unjust award.

The same witness, in another deposition, states that he was present at a meeting of the arbiters, and heard Thomas Herbert say that they had the hands of Abraham Faw so fast tied that he could not, for his life, get them loose.

It is impossible to consider these expressions in an arbiter without some disapprobation. But what led to the employment of them does not appear; nor is the court informed of the temper in which they were employed. It is worthy of remark that Thomas Herbert does not appear to have had an opportunity of cross-examining this witness, and that this deposition was *taken be- [*176] fore the arbiters were made parties to the cause.

There is some testimony respecting some altercations or jealousies between Faw and some of the arbiters at a corporation election, but they were too trivial to be worthy of notice; and as they occurred about the time of the submission, and before the arbiters proceeded on the business, it is supposed that they would have induced Faw, had he thought them of any importance, to make some effort to prevent an award.

Upon a view of the whole case, the court is of opinion that the plaintiff in the court below has not shown sufficient matter to set aside the judgment at law, and doth therefore direct that the decree of the circuit court be reversed and annulled.

After the decision of the cause, *C. Lee*, for the defendant in error, cited Kyd on Awards, to show that where the dispute is about land, the submission and award must be by deed.

MARSHALL, C. J. That is where the title is in question. But here the title was conveyed — the dispute was only as to the price. The question of title was not submitted.

LIVINGSTON, J. Although that point was not made in the argument, yet it was considered by the court.

HUGHES *v.* MOORE.

7 C. 176.

If the plaintiff discontinue as to one count, the rights of the parties under the other counts are unaffected.

If *profert* is made in one count, and oyer granted, the deed on the record is taken to be that declared on in that count only.

A promise to pay a sum of money, in consideration of the release of an equitable title, is within the statute of frauds.

ERROR to the circuit court for the District of Columbia, in an action of *assumpsit*. The first count made *profert* of a sealed instrument, executed by the plaintiff and one John Darby, whereby the plaintiff acquired an equitable right to certain lands. It then averred that the defendant, with notice of the plaintiff's rights, wrongfully acquired the legal title, and afterwards, in consideration that the plaintiff would release all claim to the lands, the defendant promised to pay him a sum of money. Oyer was granted of the deed. The residue of the substance of the pleadings and proceedings is stated in the opinion of the court.

Swann and *C. Simms*, for the plaintiff.

Jones and *C. Lee*, for the defendant.

[*189] *MARSHALL, C. J., delivered the opinion of the court, as follows:

Much of the seeming intricacy of this cause will disappear, if we extricate the questions made by the pleadings before the court, from others which might greatly embarrass and perplex it.

The declaration contains four counts. The first recites an original contract between Cleon Moore and John Darby, for the sale of certain lands, lying in Kentucky, and proceeds to recount in detail those transactions on which the action was founded. The other counts state, in different terms, the several *assumpsits*, which they allege to have been made.

The defendants crave oyer of the written contract, stated [*190] in the first count, and file several pleas to that *count. They then, without repeating the oyer, file similar pleas to the remaining counts. After taking issue on some of the pleas, and demurring to others, the plaintiff below discontinues his first count.

By the counsel for Hughes, this has been considered as error. But the court can perceive no reason for this opinion. After this discontinuance, the parties are in precisely the same situation, as if all the issues both of law and fact which were joined upon that count, had been decided in favor of the defendant below. Such decision could not, in point of law, have affected the rights of the parties under the issues joined on the remaining counts, and consequently the discontinuance upon that count must leave those rights unimpaired. Whether this count remain in the declaration, or be stricken out of it, the right of the plaintiff in the circuit court, to recover on the other counts, will be precisely the same. The examination of this right must be conducted on the same principles as if the declaration had never contained the first count.

By the plaintiff in error it is contended, that the oyer, which was prayed of the written contract alleged in the first count, spreads that contract on the record, and makes it a part of all his subsequent pleas. This is certainly true with respect to all his subsequent pleas to that count, but not with respect to his pleas to the other counts. Different counts allege different contracts and different *assumpsits*. It is upon this idea alone, that a verdict can be rendered for the plaintiff, on one count, and for the defendant on another. Now the oyer of one contract cannot be the oyer of another contract, and cannot spread upon the record a contract supposed to be totally distinct from that which was read. The discontinuance of the first count produces no change in this respect, in the condition of the parties. Had it remained, it could have had no influence on the other counts, nor could the oyer of the written contract it stated, have transferred that contract to the other counts.

The second count states, that Cleon Moore was owner and proprietor of a plat and certificate of survey for lands lying in Kentucky, for which he was entitled to a patent from the government of that State; and that *James Hughes, without authority, [*191] transferred that plat and certificate, in the name of Cleon Moore, to John Darby and the said Hughes, by which wrongful act a patent for the said land was issued to the said Darby & Hughes, to the great injury of the said Moore. That afterwards the said Hughes promised to pay to the said Moore, "the sum of seven hundred pounds for the said injury, and loss of the said land assigned as aforesaid; the said plaintiff at the same time, agreed to the said terms, and to accept of the said compensation in full of all claims and demands for the said land and for the injury aforesaid."

To this count, the defendant pleaded several pleas, one of which was, that neither the promise nor any memorandum thereof was made

in writing. To this plea the plaintiff demurred, and the court sustained the demurrer.

The correctness of this decision depends entirely on the application of the statute of frauds to the contract stated in the declaration.

Cleon Moore is averred to have been the proprietor of a plat and certificate of survey on which Hughes & Darby obtained a patent by using his name without authority. This tortious act did not divest Moore of his equitable title. The land, in equity, was his. Did he part with his title by the contract stated in the declaration? The answer must, in the opinion of the whole court, be in the affirmative. "He agreed to accept of the said compensation in full of all claims and demands for the said land, and for the injury aforesaid. This, then, was an agreement to sell his equitable title to the land for the sum of 700*l*. The court can perceive no distinction between the sale of land to which a man has only an equitable title, and a sale of land to which he has a legal title. They are equally within the statute.

It is, therefore, the unanimous opinion of this court, that the judgment upon the demurrer to this plea, ought to have been in favor of the defendant below. This plea being a complete bar to the second count, it is unnecessary to consider the other pleas.

[*192] * The third count states the title of Cleon Moore, and the injury sustained by him to the same effect with the second count. It then states a conversation between the parties, "concerning a compensation for the loss, and a liquidation of the damages sustained by the said Cleon, by reason of the misconduct and wrongdoing of the said James in the premises, and of the vesting them, the said Darby & Hughes, with the legal title to the said land as aforesaid; and it was then and there agreed by the said James, on his part, in consideration of the premises, and of the just claims of the said Cleon, for compensation and damages as aforesaid, that the said James should pay to the said Cleon, in satisfaction for the same, the sum of 700*l*.," &c. "And the said Cleon then and there agreed, on his part, to accept of the said seven hundred pounds in full compensation of his just claims as aforesaid," and, upon the same being secured, &c., to release and quitclaim to the said James, all his, the said Cleon's, claims and demands whatsoever, for compensation, redress, or damages, arising from the wrongdoing and misconduct of the said James in the premises, and from the vesting the said Darby & Hughes, with the legal title to the said land as aforesaid.

To this count, also, the statute of frauds was pleaded in bar. The plaintiff below demurred to the plea, and the defendant joined in demurrer.

Upon the true construction of the contract stated in this count, there was some contrariety of opinion among the judges. It is, however, the opinion of the majority, that the contract must be understood to import a sale of land, and that the sum of money stipulated to be paid, was, in contemplation of the parties, to extinguish the title of the said Cleon Moore.

The conversation was "concerning a compensation for the loss and a liquidation of the damages sustained by the said Cleon," not only "by reason of the misconduct of the said Hughes, but also by reason of the vesting them, the said Darby & Hughes, with the legal title to the said land." "And it was then agreed, in consideration of the just claims of the said Cleon, for compensation and damages, that the said *James should pay the said Cleon, in satis- [*193] faction for the same, the sum of 700*l.*" To the majority of the court, it seems, that a compensation for the loss of the title to the land must be understood to be a compensation for the land itself, and that the receipt of this money by Cleon Moore, would not only have barred an action for damages, but a suit in equity for the title.

If this opinion be correct, then the contract is substantially for the sale of land, and, to be valid, ought to have been in writing. On this plea also the demurrer ought to have been overruled.

The fourth count states the injury more in detail, than is done in either the second or third counts. It states the claim of Cleon Moore, to be compensated for the loss sustained by his land being granted without his consent to Hughes & Darby. A conversation was then held, and "propositions for a compromise were made, touching the compensation and indemnification of him, the said Cleon," "and it was then and there agreed by the said James, in consideration of the just claims of the said Cleon, to be compensated for the damage and injury for the misconduct of the said James in the premises, and in consideration of the said James having procured and obtained a patent to be completed and issued to the said James, and the said John Darby, as last aforesaid, for the said land," that he, the said James, would well and truly pay the said Cleon, one other sum of 700*l.* This the "said Cleon agreed to accept in satisfaction of his just claims to compensation arising from the causes and considerations last aforesaid."

The compensation here offered and accepted, is for the injury sustained by Cleon Moore, in consequence of the grant of his land, by the State of Kentucky, to Hughes & Darby. It seems to the court, that this compensation was in lieu of the patent itself, and must have been intended to extinguish his right to that patent. It is difficult to suppose an intention, in this case, to receive a full compensation

for the loss of a title, and yet to retain the right to that title. The majority of the court is of opinion that, under the contract as stated in this count also, the payment of the money agreed to be
[*194] *paid, would have extinguished the right of Cleon Moore to the land in question, and that this contract likewise is substantially a contract for the sale of land. The demurrer, therefore, to this plea, ought to have been overruled.

It is unnecessary to examine other points which were made in the cause. The judgment of the circuit court must be reversed, and judgment rendered for the plaintiff in error.

Judgment reversed.

Barton v. Petit and Bayard.

7 C. 194.

If the plaintiff declare against two, he cannot take judgment against one alone, until he has gone through with such proceedings as the law provides to compel the appearance of the other.

In Virginia, if the marshal return on an *alias capias* that one defendant is not an inhabitant, the suit abates as to him.

The case is stated in the opinion of the court.

P. B. Key, for the plaintiff.

E. J. Lee and *Swann*, for the defendant.

[*200] *Washington, J., delivered the opinion of the court, as follows:

This was an action of debt brought in the circuit court for the district of Virginia, by Petit and Bayard, against Seth Barton and Thomas Fisher, upon a judgment rendered in the general court of Maryland. The declaration is against the said Barton and Fisher, late merchants and partners, trading under the firm of Barton and Fisher, citizens and inhabitants of the State of Virginia, both of whom are alleged to be in the custody of the marshal. The record states that Barton, who had been arrested upon the *capias*, gave bail and put in the plea of payment, on which an issue was joined, and a verdict was rendered against him. He afterwards moved in arrest of judgment, and, amongst other reasons, assigned the following, namely: That the declaration states a joint cause of action against

the said Barton, and one Thomas Fisher, and that, therefore, a judgment ought not to be rendered against him alone. The
* motion in arrest of judgment having been argued and [*201]
overruled, judgment was rendered against Barton, and the
record has been removed into this court by writ of error.

The general rule certainly is, that if two or more persons are sued in a joint action, the plaintiff cannot proceed to obtain a judgment against one alone, but must wait until the others have been served with process, or until the other defendants have been proceeded against as far as the law authorizes for the purpose of forcing an appearance. In England, the plaintiff must proceed to outlaw the defendants, who have not been served, before he can proceed against those who appear. In Virginia, where this suit was brought, the plaintiff might have taken out an *alias* and a *pluries capias*, or *testatum capias*, or, at his election, an attachment against the estate of such defendant; or, upon the return of a *pluries* not found, the court may order a proclamation to issue, warning the defendant to appear on a certain day, and, if he fail to do so, judgment by default may be entered against him.

But, whatever may be the mode provided by law for forcing an appearance, the plaintiff cannot proceed to obtain a judgment against one defendant in a joint action against two, until he has proceeded against the other as far as the law will authorize, unless the law dispenses with the necessity of proceeding against the other defendant beyond a certain point to force an appearance. Thus, in Pennsylvania, (as is known to one of the judges of this court,) if the sheriff return *non est* as to one defendant, the plaintiff may proceed against the other on whom the writ was served, stating, in his declaration, the return of the writ as to his companion.

To remove the objection which arises in this case, the plaintiff obtained a *certiorari* to the circuit court of Virginia, on a suggestion of diminution, and it now appears, by the certificate of the clerk of that court, that an *alias capias* issued against Thomas Fisher, which was not returned, but the plaintiff's attorney caused the suit to be abated as to the said Fisher, upon information which he had received that the said Fisher was no inhabitant of the district of
Virginia. Had the * marshal returned the writ and stated [*202]
this fact, the law would have abated it as to Fisher; in
which case the objection to the subsequent proceedings against Barton would have been removed. But since the plaintiff could not have supported his action originally against one defendant on a joint cause of action, where it appeared by his own showing, or by a plea in abatement, that there was another person who was jointly bound,

and might be sued, he ought not to be permitted, after stating a joint cause of action, to abate or discontinue his action against one, unless authorized to do so by the return of the process against that defendant. If he does so, it furnishes a good ground for arresting the judgment.

It is contended, in support of this judgment, that as, by the law of Virginia, the plaintiff must file his declaration at the next succeeding rule day after the defendant shall have entered his appearance, or that the defendant may rule him to do so, which if he fails to do, he shall be nonsuit, the plaintiff not only may, but is bound to proceed against one defendant alone, after he has appeared. But the court understands this law as applying to a single defendant, or, if there be more, to the appearance of all the defendants.

Judgment reversed.

7 C. 288.

Wilson *v.* Koontz.

7 C. 202.

A foreign attachment in chancery is, as against the debtor, an action at law, and he may plead the statute of limitations without the support of an answer.

A removal from the county which does not in fact obstruct an action, is not within the exception contained in the 14th section of the act of limitations of Virginia.

Appeal from a decree of the circuit court for the District of Columbia, dismissing a bill filed by Wilson against Koontz, as debtor, and certain garnishees. Koontz pleaded the statute of limitations. The replication averred that a suit at law was brought against Koontz, and *non est inventus* returned, and the suit discontinued. That afterwards, but more than six years before the bill was filed, he paid a part of the debt, and subsequently thereto, removed out of the county, into another part of the State, and his place of residence was not known to the plaintiff. To this there was a demurrer.

E. J. Lee, for the appellant.

Taylor, for the appellee.

[*205] *Marshall, C. J., delivered the opinion of the court, to the following effect:

This is a suit in chancery, and the defendant pleads the act of limitations. The plaintiff by his replication attempts to bring the case within the exception contained in the 14th section of that act; but it seems essential, under that section, that the complainant should have been actually defeated or obstructed in bringing his action by the removal of the defendant. There is no evidence of his intention of bringing his action sooner than he did, or that he was delayed by the defendant's removal from the county. The court is therefore of opinion that the circumstance of removal is not sufficient to take the case out of the statute.

It is objected, that the plea of the statute of limitations is not good unless the defendant answer also and deny the debt, or aver it to be paid. But if this be a valid objection, it ought to have been taken at the time of offering the plea, and before the issue was joined. It is now too late.

If it be a good objection in cases within the general * ju- [*206]
risdiction of a court of equity, yet it is not valid in a case like the present, which is really a case at law as between the present parties.

The court is of opinion that the plea is a good bar, and that the decree should be affirmed.

Riddle v. Moss.

7 C. 206.

The principal obligor in a bond is not a competent witness for the surety, in an action upon the bond; the principal being liable to the surety for costs in case the judgment should be against him.

Error to the circuit court for the District of Columbia.

This was an action of debt on a joint bond given by John Welch as principal obligor, and the defendant Moss, as his surety. The suit abated as to Welch by the return of the marshal, that he was no inhabitant of the district. The defendant, Moss, pleaded specially certain facts in avoidance of the bond as to him alone; upon which issue was joined; and upon the trial the defendant, Moss, offered as a witness the said John Welch, the principal obligor, who was permitted by the court below to testify for the defendant, and upon his cross-examination confessed that he had made over to Moss

all his property as security to indemnify him against the event of this suit.

The plaintiff took a bill of exceptions, and the verdict and judgment being against him, brought his writ of error to this court.

E. J. Lee, and *Jones*, for the plaintiff in error.

[* 207] * *C. Lee*, contrà.

MARSHALL, C. J., delivered the opinion of the court, to the following effect:

The court is of opinion that Welch, the coöbligor, was in-
[* 208] terested, and was therefore an incompetent witness. * It was a consideration of some importance that he had given Moss a deed of trust of his effects to indemnify him against this suit; but the principal circumstance was, that Welch's liability would be increased, to the extent of the costs of this suit, if the judgment should be against Moss.

Judgment reversed.

11 P. 86.

SHEEHY *v.* MANDEVILLE.

7 C. 208.

A note payable at sixty days, cannot be given in evidence to support a count upon a note, which count does not state when the note was payable. The variance is fatal.

Upon executing a writ of inquiry in Virginia, in an action of assumpsit upon a promissory note, it is necessary to produce a note corresponding with that declared on, but it is not necessary to prove the signature.

The plaintiff cannot give evidence that the variance was the effect of mistake or inadvertence of the attorney, and that the note produced was that which was intended to be described in the declaration.

ERROR to the circuit court for the District of Columbia.

The case is stated in the opinion of the court.

E. J. Lee, and *Jones*, for the plaintiff.

Swann, for the defendant.

*MARSHALL, C. J., delivered the opinion of the court, as [* 216] follows:

This suit was instituted on a promissory note, executed by the defendant, and made payable to the plaintiff. After describing the note accurately, with the exception of the time when it became payable, which is altogether omitted, the declaration proceeds, in the usual form, to state, that the defendant being so liable, assumed to pay the sum mentioned in the note when he should be thereunto required, &c.

To this count a special plea was filed, which, on demurrer, was held insufficient. Judgment, on the demurrer, being rendered for the plaintiff, a writ of inquiry was awarded.

On executing this writ, the plaintiff produced a note payable sixty days after date, and offered to prove that it was the note on which the suit was instituted, and that the omission to state the day of payment in the declaration was the mistake of counsel.

The court refused to permit the note to go to the jury; and also instructed them, that unless a note conforming to the declaration should be adduced, or its absence accounted for, they must presume it to have been passed away or paid. The jury under these instructions *found one cent damages, for which judgment [* 217] was rendered. To this judgment the plaintiff has sued out a writ of error.

The errors assigned are, 1st. That the variance was not fatal; 2d. That on a writ of inquiry the production of the note was unnecessary.

Courts, being established for the purpose of administering real justice to individuals, will feel much reluctance at the necessity of deciding a cause on a slip in pleading, or on the inadvertence of counsel. They can permit a cause to go off on such points only when some rule of law, the observance of which is deemed essential to the general administration of justice, peremptorily requires it.

One of these rules is, that in all actions on special agreements or written contracts, the contract given in evidence must correspond with that stated in the declaration. The reason of this rule is too familiar to every lawyer to require that it should be repeated.

It is not necessary to recite the contract *in hæc verba*, but if it be recited, the recital must be strictly accurate. If the instrument be declared on according to its legal effect, that effect must be truly stated. If there be a failure in the one respect, or the other, an exception, for the variance, may be taken, and the plaintiff cannot give the instrument in evidence.

The plea of *non assumpsit* denies the contract; and an instrument,

not conforming to the declaration either in words where it is recited, or according to its legal effect where the legal effect is stated, although proved to be the act of the defendant, is not the same act, and therefore does not maintain the issue on his part.

In this case, the legal effect of the promissory note is stated; and that effect on a note, having no day of payment, would be that it was payable immediately. This declaration goes on that idea, and avers a promise to pay when required. A note payable sixty days after date is a note different from one payable immediately,

[* 218] *and would not support the issue had *non assumpsit* been pleaded, and issue joined on this plea.

Now, what difference is produced by the default of the defendant? He confesses the note stated in the declaration, but he confesses no other note. The necessity, then, of showing a note conforming to the declaration, is precisely as strong on executing a writ of inquiry, as on trying the issue. No reason is perceived why a variance which would be fatal in the one case would not be equally fatal in the other.

The cases cited by the plaintiff's counsel have been considered, but they do not come up to this. They are not cases where the legal effect of the written instrument, offered on executing the writ of inquiry, has differed from that of the instrument stated in the declaration.

The court is also of opinion that the production of the note, on executing the writ of inquiry, was necessary. The default dispenses with the proof of the note, but not with its production. In England, damages have in some circumstances been assessed without a jury, but it is not stated that those damages have been assessed without a view of the note. The practice of this country is to require that the note should be produced, or its absence accounted for, and the rule is a safe one.

Judgment affirmed.

Conway's Executors and Devisees *v.* Alexander.

7 C. 218.

Parties may make a conditional sale, but the leaning of courts of equity is against such sales.

The true inquiry is, whether the instrument was intended as a sale, or as security for a debt, and the extrinsic evidence, as well as the terms of the deed, must be examined to determine this question.

The absence of a covenant to repay is not decisive.

The fact that the sum paid, bore no proportion to the real value of the land, is entitled to great weight, upon the question whether a conditional sale was intended.

APPEAL from the circuit court for the District of Columbia. The case is fully stated in the opinion of the court.

C. Lee and *Jones*, for the appellants.

Taylor, for the appellees.

*MARSHALL, C. J., delivered the opinion of the court, as [*235] follows:

This suit was brought by Walter S. Alexander, as devisee of Robert Alexander, to redeem certain lands lying in the neighborhood of Alexandria, which were conveyed by Robert Alexander, in trust, by deed dated the 20th of March, 1788, and which were afterwards conveyed to William Lyles, and by him to the testator of the plaintiffs in error.

The deed of the 20th of March, 1788, is between Robert Alexander of the first part, William Lyles of the second part, and Robert T. Hooe, Robert Muire, and John Allison, of the third part. Robert Alexander, after reciting that he was seized of one undivided moiety of 400 acres of land, except 40 acres thereof previously sold to Baldwin Dade, as tenant in common with Charles Alexander, in consideration of 800*l.* paid by William Lyles, and of the covenants therein mentioned, grants, bargains, and sells twenty acres, part of the said undivided moiety, to William Lyles, his heirs and assigns forever, and the residue thereof, except that which had been previously sold to Baldwin Dade, to the said Robert T. Hooe, Robert Muire, and John Allison, in trust, to convey the same to William Lyles at any reasonable time after the first day of July, 1790, unless Robert Alexander shall pay to the said William Lyles, on or before that day, the sum of 700*l.* with interest from the said 20th of March, 1788. And if the said Robert Alexander shall pay the said William Lyles, on or before that day, the said sum of 700*l.* with interest, then to reconvey the same to the said Robert Alexander. Robert Alexander further covenants, that, in the event of a reconveyance to him, the said twenty acres sold absolutely shall be laid off adjoining the tract of land on which William Lyles then lived. The trustees covenant to convey to William Lyles, on the non-payment of the said sum of 700*l.*; and to reconvey to Robert Alexander in the event [*236] of payment. Robert Alexander covenants for further assurances as to the 140 acres, and warrants the twenty acres to William Lyles and his heirs.

On the 19th of July, 1790, the trustees, by a deed in which the

trust is recited, and that Robert Alexander has failed to pay the said sum of 700*l.*, convey the said land in fee to William Lyles.

On the 23d of August, 1790, William Lyles, in consideration of 900*l.*, conveyed the said 20 acres of land and 140 acres of land to Richard Conway, with special warranty against himself and his heirs.

On the 9th day of April, in the year 1791, a deed of partial partition was made between Richard Conway and Charles Alexander. This deed shows that Charles Alexander asserted an exclusive title in himself to a considerable part of this land.

Soon after this deed of partition was executed, Richard Conway entered upon a part of the lands assigned to him, and made on them permanent improvements of great value, and at considerable expense.

In January or February, 1793, Robert Alexander departed this life, having first made his last will in writing, in which he devises the land sold to Baldwin Dade; but does not mention the land sold to William Lyles.

The plaintiff, who was then an infant, and who attained his age of twenty-one years in November, 1803, brought his bill to redeem in 1807. He claims under the residuary clause of Robert Alexander's will.

The question to be decided is, whether Robert Alexander, by his deed of March, 1788, made a conditional sale of the property conveyed, by that deed, to trustees, which sale became absolute by the non-payment of 700*l.*, with interest, on the 1st of July, 1790, and by the conveyance of the 19th of that month, or is to be considered as having only mortgaged the property so conveyed.

[*237] To deny the power of two individuals, capable of *acting for themselves, to make a contract for the purchase and sale of lands defeasible by the payment of money at a future day, or, in other words, to make a sale with a reservation to the vendor of a right to repurchase the same land at a fixed price and at a specified time, would be to transfer to the court of chancery, in a considerable degree, the guardianship of adults as well as of infants. Such contracts are certainly not prohibited either by the letter or the policy of the law. But the policy of the law does prohibit the conversion of a real mortgage into a sale. And as lenders of money are less under the pressure of circumstances which control the perfect and free exercise of the judgment than borrowers, the effort is frequently made by persons of this description to avail themselves of the advantage of this superiority, in order to obtain inequitable advantages. For this reason the leaning of courts has been against them, and doubtful cases have generally been decided to be mortgages. But as a conditional sale, if really intended, is valid, the inquiry in every case must

be, whether the contract in the specific case is a security for the repayment of money or an actual sale.

In this case the form of the deed is not, in itself, conclusive either way. The want of a covenant to repay the money is not complete evidence that a conditional sale was intended, but it is a circumstance of no inconsiderable importance. If the vendee must be restrained to his principal and interest, that principal and interest ought to be secure. It is, therefore, a necessary ingredient in a mortgage, that the mortgagee should have a remedy against the person of the debtor. If this remedy really exists, its not being reserved in terms will not affect the case. But it must exist in order to justify a construction which overrules the express words of the instrument. Its existence, in this case, is certainly not to be collected from the deed. There is no acknowledgment of a preëxisting debt, nor any covenant for repayment. An action, at law, for the recovery of the money, certainly could not have been sustained; and if, to a bill in chancery praying a sale of the premises, and a decree for so much money as might remain due, Robert Alexander had answered that this was a sale and not a mortgage, clear proof to *the [*238] contrary must have been produced to justify a decree against him.

That the conveyance is made to trustees is not a circumstance of much weight. It manifests an intention in the drawer of the instrument to avoid the usual forms of a mortgage, and introduces third persons, who are perfect strangers to the transaction, for no other conceivable purpose than to entitle William Lyles to a conveyance subsequent to the non-payment of the 700*l.*, on the day fixed for its payment, which should be absolute in its form. This intention, however, would have no influence on the case, if the instrument was really a security for money advanced and to be repaid.

It is also a circumstance which, though light, is not to be entirely disregarded, that the twenty acres, which were admitted to be purchased absolutely, were not divided and conveyed separately. It would seem as if the parties considered it as at least possible that a division might be useless.

Having made these observations on the deed itself, the court will proceed to examine those extrinsic circumstances which are to determine whether it is to be construed a sale or a mortgage.

It is certain that this deed was not given to secure a preëxisting debt. The connection between the parties commenced with this transaction.

The proof is also complete that there was no negotiation between the parties respecting a loan of money; no proposition ever made respecting a mortgage.

The testimony on this subject is from Mr. Lyles himself and from Mr. Charles Lee. There is some contrariety in their testimony, but they concur in this material point. Mr. Lyles represents Alexander as desirous of selling the whole land absolutely, and himself as wishing to decline an absolute purchase of more than twenty acres. Mr. Lee states Lyles as having represented to him that Alexander was unwilling to sell more than twenty acres absolutely, and offered to sell the residue conditionally. There is not, however, a [*239] *syllable in the cause, intimating a proposition to borrow money or to mortgage property. No expression is proved to have ever fallen from Robert Alexander before or after the transaction, respecting a loan or a mortgage. He does not appear to have imagined that money was to be so obtained; and when it became absolutely necessary to raise money, he seems to have considered the sale of property as his only resource.

To this circumstance the court attaches much importance. Had there been any treaty — any conversation respecting a loan or a mortgage, the deed might have been, with more reason, considered as a cover intended to veil a transaction differing in reality from the appearance it assumed. But there was no such conversation. The parties met and treated upon the ground of sale and not of mortgage.

It is not entirely unworthy of notice that William Lyles was not a lender of money, nor a man who was in the habit of placing his funds beyond his reach. This, however, has not been relied upon, because the evidence is admitted to be complete, that Lyles did not intend to take a mortgage. But it is insisted that he intended to take a security for money, and to avoid the equity of redemption; an intention which a court of chancery will invariably defeat.

His not being in the practice of lending money is certainly an argument against his intending this transaction as a loan, and the evidence in the cause furnishes strong reason for the opinion that Robert Alexander himself did not so understand it. In this view of the case the proposition made to Lyles, being for a sale and not for a mortgage, is entitled to great consideration. There are other circumstances, too, which bear strongly upon this point.

The case, in its own nature, furnishes intrinsic evidence of the improbability that the trustees would have conveyed to William Lyles without some communication with Robert Alexander. They certainly ought to have known from himself, and it was easy to procure the information, that the money had not been paid. If [*240] he had considered this deed as a mortgage, he would *naturally have resisted the conveyance, and it is probable that

the trustees would have declined making it. This probability is very much strengthened by the facts which are stated by Mr. Lee. The declaration made to him by Lyles, after having carried the deed drawn by Mr. Lee to Mr. Hooe, that the trustees were unwilling to execute it until the assent of Alexander could be obtained, and the directions given to apply for that assent, furnish strong reasons for the opinion that this assent was given.

It is also a very material circumstance that, after a public sale from Lyles to Conway, and a partition between Conway and Charles Alexander, Conway took possession of the premises, and began those expensive improvements which have added so much to the value of the property. These facts must be presumed to have been known to Robert Alexander. They passed within his view. Yet his most intimate friends never heard him suggest that he retained any interest in the land. In this aspect of the case, too, the will of Robert Alexander is far from being unimportant. That he mentions forty acres sold to Baldwin Dade, and does not mention one hundred and forty acres, the residue of the same tract, can be ascribed only to the opinion that the residue was no longer his.

This, then, is a case in which there was no previous debt, no loan in contemplation, no stipulation for the repayment of the money advanced, and no proposition for or conversation about a mortgage. It is a case in which one party certainly considered himself as making a purchase, and the other appears to have considered himself as making a conditional sale. Yet there are circumstances which nearly balance these, and have induced much doubt and hesitation in the mind of some of the court.

The sale, on the part of Alexander, was not completely voluntary. He was in jail, and was much pressed for a sum of money. Though this circumstance does not deprive a man of the right to dispose of his property, it gives a complexion to his contracts, and must have some influence in a doubtful case. The very fact that the sale was conditional, implies an expectation to redeem.

*A conditional sale made in such a situation, at a price [*241] bearing no proportion to the value of the property, would bring suspicion on the whole transaction. The excessive inadequacy of price would, in itself, in the opinion of some of the judges, furnish irresistible proof that a sale could not have been intended. If lands were sold at 5*l.* per acre, conditionally, which, in fact, were worth 15*l.* or 20*l.* or 50*l.* per acre, the evidence furnished by this fact, that only a security for money could be intended, would be, in the opinion of three judges, so strong as to overrule all the opposing testimony in the cause.

But the testimony on this point is too uncertain and conflicting to prevail against the strong proof of intending a sale and purchase, which was stated.

The sales made by Mr. Dick and Mr. Hartshorne of lots for building, although of land more remote from the town of Alexandria than that sold to Lyles, may be more valuable as building lots, and may consequently sell at a much higher price than this ground would have commanded. The relative value of property in the neighborhood of a town depends on so many other circumstances than mere distance, and is so different at different times, that these sales cannot be taken as a sure guide.

That twenty acres, part of the tract, were sold absolutely for 5*l.* per acre; that Lyles sold to Conway at a very small advance; that he had previously offered the property to others unsuccessfully; that it was valued by several persons at a price not much above what he gave; that Robert Alexander, although rich in other property, made no effort to relieve this, are facts which render the real value, at the time of sale, too doubtful to make the inadequacy of price a circumstance of sufficient weight to convert this deed into a mortgage.

It is, therefore, the opinion of the court that the decree of the circuit court is erroneous and ought to be reversed, and that the cause be remanded to that court with directions to dismiss the bill.

Decree reversed.

11 P. 351; 12 H. 139; 19 H. 289.

[*242] DUNLOP *v.* MUNROE.

7 C. 242.

Under an allegation of negligence by a postmaster, evidence can not be given of negligence of his sworn assistant.

A mere omission by a postmaster, seasonably to forward a letter, is not a cause of action; some damage must be proved to have been suffered by the plaintiff.

Parol evidence, that one set of written instructions superseded another, can not be given.

ERROR to the circuit court for the District of Columbia in an action on the case against Munroe, postmaster at the city of Washington. The declaration contained nine counts, to which there were eighteen pleas in bar, some terminating in issues in law, and others in issues in fact. Upon the trial of the issues in fact, seven bills of exception

were taken. The opinion of the court is intelligible without detailing the voluminous record.

F. S. Key and *C. Lee*, for the plaintiff.

Jones and *Morsell*, for the defendant.

* JOHNSON, J., delivered the opinion of the court, as fol- [*268] lows:

* It is necessary to dissipate the cloud of pleading in which [*269] this case is enveloped, in order to form a distinct idea of the questions intended to be brought to the view of the court below.

The object is to charge the postmaster with the loss of money sent by mail; and the points, which the exceptions are intended to make, are, how far he is liable for his own act or neglect, how far for the acts or neglect of his assistants, and what evidence shall be sufficient to support the plaintiff's action.

But unfortunately, as not unfrequently happens in this complex and injudicious mode of conducting a suit, with all the clerical skill displayed by counsel in multiplying their counts and pointing their bills of exceptions, the principal questions are really, at last, not brought to the view of this court.

On the first and second exception it is unnecessary to make any remark, as they are admitted to apply to counts which the evidence did not support, and have been, in fact, abandoned.

The third exception is intended to raise the question how far a postmaster is liable for the neglect of his assistants; but, connected with the pleadings, it presents another and a very different question, to wit, whether, when the issue is taken upon the neglect of the postmaster himself, it is competent to give in evidence, neglect in the assistant acting under him. Now the distinction between the relation of a postmaster to his sworn assistant acting under him, and between master and servant generally, has long been settled; and although the latter relation might sanction the admission of such evidence, we are unanimously of opinion that, if it is intended to charge a postmaster for the negligence of his assistants, the pleadings must be made up according to the case; and his liability then will only result from his own neglect in not properly superintending the discharge of their duties in his office.

In the fourth exception, the only difference between the opinion prayed for and that given, is, that the court require the loss to be a consequence of not forwarding * the letter described [*270] in the declaration. Now, in justice to the correctness of the

plaintiff's counsel, this court hope that they meant nothing more than what the court conceded; for, certainly, if the loss was not a consequence of the state of things made out in the evidence, they were not entitled to recover.

On the fifth exception it is only necessary to remark, that if the court below erred at all, it was in conceding too much to the prayer of the plaintiff. An entry on the post-bill is by no means conclusive evidence of the transmission of a letter, for, it may still never have been put into the mail, or may have been stolen in its passage.

The sixth exception is equally untenable. The instructions of the postmaster-general spoke for themselves. If the one superseded or rescinded the other, the evidence was to be sought for by comparing them together.[1]

And the seventh exception affords the court an opportunity to remark how much more conducive to the purposes of justice it would be to substitute special verdicts, and demurrers to evidence, for the tedious and embarrassing practice of the court from which this case comes up. It is a fact that this bill of exceptions claims a right of recovery without stating any loss or damage whatever. The opinion prayed for was, that if the jury believed the various facts therein detailed, then it is incumbent on the defendant to make out a just, reasonable, and sufficient excuse for omitting to forward the letter described. But, unless an individual has sustained some loss or damage by an omission of that kind, why should the postmaster be held to make out a defence? Each bill of exceptions must be considered as presenting a distinct, substantive case; and it is on the evidence stated in itself alone that the court is to decide. We cannot go beyond it and collect other facts which must have been in the mind of the party, and the insertion of which in this bill of exceptions could alone have sanctioned the opinion as prayed for.

Upon the whole, the judgment below must be affirmed.

7 H. 833.

[1] The court below refused to allow a witness to be asked whether one set of instructions superseded another.

*HEZEKIAH WOOD *v.* JOHN DAVIS, and others. [*271]

7 C. 271.

A verdict and judgment that the mother was born free, is not conclusive evidence of the freedom of her children — unless between the same parties or privies.

ERROR to the circuit court for the District of Columbia, sitting at Washington.

The defendants in error, John Davis and others, were children of Susan Davis, a mulatto woman, who had obtained a judgment for her freedom in a suit which she had brought against Caleb Swann, to whom she had been sold by Wood, the plaintiff in error.

The petition of the children stated that their mother, Susan Davis, had obtained a judgment for her freedom upon the ground that she was born free. The issue was joined upon the question whether the petitioners were entitled to their freedom.

Upon the trial of this issue, in the court below, the plaintiff in error, Wood, tendered a bill of exceptions which stated that it was admitted that the petitioners were the children of Susan Davis; and they produced the record of the judgment in favor of their mother, Susan Davis, against Caleb Swann, (in which case her petition stated that she was born free, being descended from a white woman; and the issue joined was upon the question whether she was free or a slave.) And it was admitted that Susan Davis had been sold by Wood to Swann before the judgment; whereupon the petitioners, by their counsel, prayed the court to direct the jury, that the record aforesaid and the matters so admitted were conclusive evidence for the petitioners in this cause; and the court directed the jury as prayed; to which direction the defendant, Wood, excepted.

*F. S. *Key*, for the plaintiff in error. [*272]

C. Lee, contrà.

*MARSHALL, C. J., stated the opinion of the court to be, [*273] that the verdict and judgment in the case of Susan Davis against Swann, were not conclusive evidence in the present case. There was no privity between Swann and Wood; they were to be considered as perfectly distinct persons. Wood had a right to defend his own title, which he did not derive from Swann.

Judgment reversed.

Morgan v. Reintzel.

7 C. 273.

A count, stating the making of a negotiable note by the defendant payable to the plaintiff, the indorsement by the latter, protest of the note for non-payment, due notice of protest to the plaintiff, payment thereof by him, and a promise by the defendant, in consideration of the premises, to pay to the plaintiff the contents of the note, together with the cost of protest, is sufficient to support a judgment.

Error to the circuit court for the District of Columbia, to reverse a judgment for the plaintiff. The error assigned was, that the declaration contained a count, the substance of which is detailed in the above head note.

F. S. Key, for the plaintiff.

Morsell, for the defendant.

[*275] *Marshall, C. J., after stating the case, observed that the court could see no error in the judgment.

The payment of the money by the plaintiff, under the circumstances stated in the count, was a sufficient consideration for the assumpsit.

The principal objection was that the count ought to have been founded upon the note, so as to oblige the plaintiff to pro-
[*276] duce it on the trial. But it states that *the note was paid by the plaintiff; and the court thinks that the note must have been produced upon the trial.

Judgment affirmed.

16 P. 319.

Wise & Lynn v. The Columbian Turnpike Company.

7 C. 276.

Upon a writ of error to the circuit court for the District of Columbia, this court has no jurisdiction, if the sum awarded be less than $100, although a greater sum may have been originally claimed.

The Columbian Turnpike Company obtained a rule upon the plaintiffs in error, Wise & Lynn, to show cause why this writ of error

should not be dismissed for want of jurisdiction, the matter in dispute being less than $100, and the writ of error being to the circuit court for the District of Columbia.

Upon the return of the rule, it appearing that the sum awarded was only $45, the court, all the judges being present, decided that they had no jurisdiction, although the sum claimed by Wise & Lynn, before the commissioners of the road, was more than $100.

Writ of error dismissed.

3 P. 33; 15 H. 198.

CALDWELL *v.* JACKSON.

7 C. 276.

Each party is liable to the clerk of this court for the fees due to him from each party respectively.

CALDWELL, the clerk of this court, obtained a rule against Jackson, to show cause why an attachment should not issue for non-payment of his fees in the suit * of Winchester against [*277] Jackson, which had been dismissed on the motion of Jackson, with costs, at a former term.

Milnor, now showed cause, and contended that Jackson was not liable to the clerk for his fees, inasmuch as Jackson was the defendant in error, and the writ of error had been dismissed with costs. The clerk must look to the plaintiff in error for all the costs. The bill, which had been rendered, included the expense of a copy of the record, which is not regularly taxable as costs, and therefore the non-payment of that charge can be no ground for an attachment.

MARSHALL, C. J., stated the opinion of the court to be, that each party was liable to the clerk for his fees for services performed for such party; and it is immaterial to the clerk which party recovers judgment.

Rule absolute.

Blackwell v Patten and others.

7 C. 277.

A writ of error issued in September may bear *teste* of the February term preceding, and may be returnable to the next February term, notwithstanding the intervention of the August term between the *teste* and return of the writ.

Jones, for the defendants in error, moved this court to dismiss the writ of error, because it bore *teste* of February term, 1810, was issued in September, 1810, and was returnable to February term, 1811, whereas it ought to have been tested of August term, 1810.

[*278] *The Court refused to quash or dismiss the writ of error on account of the irregularity of its *teste*.

Wallen v. Williams

7 C. 278.

This court will not quash an execution issued by the court below to enforce its decree, pending the writ of error, if the writ of error be not a *supersedeas* as to the decree.

Error to the circuit court of the district of Tennessee, to reverse a decree in chancery. The court below had issued a writ of *habere facias possessionem* to enforce its decree. The writ of error was too late to be a *supersedeas* to the decree.

Jones, for the plaintiff in error, now moved to quash the writ of *habere facias* as irregular.

P. B. Key, contrà.

[*279] *Marshall, C. J. The writ of error is to the original decree, which did not award this writ of *habere facias*. It was awarded by a subsequent order of the court, to which no writ of error issued.

Todd, J. The attachment to compel a performance of the decree was unavailing; and upon the return of it, the *habere facias* was

issued in conformity with the practice in that State, as admitted by the counsel on both sides in the court below. It was ordered as a matter of course, and no objection was made. If this motion should prevail, it will make the writ of error operate as a *supersedeas*, contrary to the intention of the act of congress.

16 H. 144. *Motion overruled.*

M'Kim *v.* Voorhies.

7 C. 279.

A state court has no jurisdiction to enjoin a judgment of a circuit court of the United States.

Certificate of a division of opinion of the judges of the circuit court of the United States for the district of Kentucky. The substance of the case was, that McKim, a citizen of Maryland, recovered a judgment in ejectment against Voorhies, a citizen of Kentucky, in the circuit court of the United States for that district. Afterwards, Voorhies filed a bill in a court of the State of Kentucky, obtained an injunction, staying all further proceedings on the judgment, and served a copy thereof on the clerk of the circuit court. McKim then applied for a writ of *habere facias*, and upon this motion the opinions of the judges were opposed.

* Todd, J., stated the opinion of the court to be, that the [*281] State court had no jurisdiction to enjoin a judgment of the circuit court of the United States; and that the court below should be ordered to issue the writ of *habere facias*.

1 H. 301.

Beatty *v.* The State of Maryland.

7 C. 281.

A final account settled by an administrator with the orphan's court, is not conclusive evidence in his favor upon the issue of *devastavit vel non*.

Error to the circuit court for the District of Columbia.

This was an action of debt brought at the instance and for the use

of Thomas Corcoran, against Thomas Beatty, upon the administration bond of Mrs. Doyle, administratrix, with the will annexed, of Alexander Doyle. The defendant was one of her sureties in that bond. The defendant after oyer pleaded a special performance of every item in the condition of the bond. To which the plaintiff replied a judgment *de bonis testatoris* obtained by him, in May, 1799, against the administratrix, *fieri facias* upon that judgment and a return of *nulla bona*. The replication also avers that the administratrix had in her hands, at the time of the judgment, goods of her testator sufficient to satisfy the debt, but that she wasted them. The defendant took issue upon the *devastavit*.

The defendant took a bill of exceptions, which showed that the plaintiff put in evidence, on the trial, a record of a judgment, recovered against the administratrix, in May, 1799, for $357, and a *fieri facias* returned *nulla bona*. Also the inventory which she had exhibited to the orphan's court of Montgomery county, Maryland, in Janu-
[*282] ary, 1795, * amounting to 3,701*l.* 2*s.* 7*d.*, Maryland currency, of which 200*l.* is stated in the inventory to be cash. Also an account of the administratrix with the estate of her testator, rendered by her to the orphan's court upon oath on the 17th of August, 1799, in which she charges herself with the sum of 1,085*l.* in addition to the former inventory, making in the whole 4,786*l.*, and claims credit for sums paid to other creditors whose claims were not entitled to preference, amounting to 3,566*l.*; leaving a balance still in her hands of 1,220*l.* equal, to $3,253, and also a second account rendered by her, upon oath, to the orphan's court in November, 1799, charging herself with a further sum of assets to the amount of 463*l.* 15*s.* 5*d.* in addition to the former balance, and claiming credit for 1,607*l.* 16*s.* 11*d.* paid to sundry creditors not entitled to preference, and still leaving a balance of 76*l.* in her hands to be administered. The defendant then offered in evidence a third account, rendered by the administratrix to the orphan's court in 1801, in which she charges herself with the former balance of 76*l.*, and claims allowance for payments and commissions to the amount of 123*l.*, leaving a balance in her favor of 47*l.* To this account, as well as to the two former, was annexed a certificate from the register of wills, that the administratrix make oath on the Holy Evangels of Almighty God, that the account was just and true as it stood stated, and that she had *bonâ fide* paid, or secured to be paid, the several sums for which she claimed an allowance, "which, after due examination, passed by order of court."

This account was offered as conclusive evidence for the defendant on the issue. But the court instructed the jury that it was not con-

clusive evidence in favor of the defendant upon that issue; and further, at the request of the plaintiff's counsel, instructed the jury that the said record of the judgment, the inventory, and the two accounts of the administratrix offered in evidence on the part of the plaintiff, were conclusive evidence in his favor to prove the *devastavit* on the part of the administratrix, to the amount of the plaintiff's claim; to which instructions of the court the defendant excepted; and the verdict and judgment being against him he brought his writ of error

* *F. S. Key*, for the plaintiff in error. [*283]

* DUVALL, J. The account was only binding upon the representatives of the estate, the distributees; and they might still open it in the general court. But the creditors are no parties to the settlement of the account, and cannot be bound by it. [*284]

There can be no doubt that the judgment against the administratrix, the inventory, and first two accounts were conclusive evidence of a *devastavit*.

MARSHALL, C. J. I believe that is the law throughout the United States.

The court is unanimously of opinion that the settlement of the account by the orphan's court is not conclusive evidence for the defendant upon the issue joined.

Judgment affirmed.

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* UNITED STATES *v.* JOHN TYLER. [*285]

7 C. 285.

Upon an indictment for putting goods on board a carriage, with intent to transport them out of the United States, contrary to the act of January 9, 1809, (2 Stats. at Large, 506,) the punishment of which offence is a fine of four times the value of the goods, it is not necessary that the jury should find the value of the goods.

THIS case having been submitted without argument —

LIVINGSTON, J., delivered the opinion of the court, as follows: —

The defendant was indicted under the act to enforce the embargo laws passed the 9th January, 1809, for loading on carriages, within the district of Vermont, nineteen barrels of pearlashes, with intent to transport the same without the United States; to wit, into the province of Canada.

On a plea of not guilty, the jury returned the following written verdict, which was recorded: —

"The jury find that the said John Tyler is guilty of the charge alleged against him in said indictment, and that the said potashes were worth $280."

The defendant moved in arrest of judgment, because the verdict was not sufficiently certain as to the value of the property charged in the indictment, the same having found the value of potashes, whereas the defendant was indicted for the intention of exporting pearlashes.

Upon this motion, the judges being opposed in opinion, the same has been certified unto this court for its direction in the premises.

The law which creates this offence provides that the party shall, upon conviction, be adjudged guilty of a high misdemeanor, and fined a sum by the court before which the conviction is had, equal to four times the value of the property so intended to be exported. The court, then, is of opinion that, under this law, no valuation by the jury was necessary to enable the circuit court to impose the [*286] proper fine; and, therefore, *that that part of the verdict which is objected to, is regarded as surplusage, and cannot deprive the United States of the judgment to which they became entitled by the defendant's conviction of the offence laid in the indictment.

It must, accordingly, be certified to the court below, that it proceed to render judgment for the United States, on the verdict aforesaid.

9 H. 571.

[*287] *FEBRUARY TERM, 1813.

THE UNITED STATES v. GORDON, and others.

7 C. 287.

A writ of error does not lie to carry to the supreme court of the United States a civil cause which has been carried from the district court to the circuit court by writ of error.

THIS was an action of debt brought in the district court of the United States for the district of Virginia, upon an embargo-bond, dated the 2d of November, 1808, conditioned to reland the cargo of The Essex, in some port of the United States, the danger of the seas only excepted.

To this plea there was a general demurrer, which was overruled by the district judge, (TYLER.) The * United [*288] States carried the cause up to the circuit court by writ of error, where the judgment was affirmed by MARSHALL, C. J.

The United States brought another writ of error to the supreme court of the United States, which was dismissed for want of jurisdiction; upon the authority of the case of United States *v.* Goodwin, 7 C. 108.[1]

5 P. 190; 12 P. 143; 14 P. 614.

BARTON *v.* PETIT and BAYARD.

7 C. 288.

If the original judgment be reversed, the reversal of the dependent judgment on the "forthcoming bond" follows, of course; but a special *certiorari* is necessary to bring up the execution upon which the bond was given so as to show the connection between the two judgments.

ERROR to the circuit court for the district of Virginia, on a judgment rendered on a bond (technically called in Virginia a "forthcoming bond") given to the marshal with condition to have certain goods forthcoming at the day of sale appointed by the marshal; being goods which he had seized under a *fi. fa.* issued upon a former judgment recovered by Petit and Bayard against Barton, which judgment was reversed at the last term of this court.

P. B. Key, for plaintiff in error.

E. J. Lee and *R. Ingersoll*, contrà.

* WASHINGTON, J., delivered the opinion of the court, as [*289] follows: —

This is a writ of error to a judgment of the circuit court of Virginia, rendered upon a bond given by the plaintiffs in error, with condition for the delivery, at a certain time and place, of property seized by the marshal to satisfy an execution which had issued from the same court. The condition not having been complied with, this judg-

[1] *Vide*, 7 C. 108; 2 W. 258, (5 Stats. at Large, 393.)

ment was rendered upon motion, and notice thereof duly served upon the obligors in the bond, agreeably to the laws of Virginia.

It is not pretended that there is any intrinsic error in this judgment to warrant its reversal; but it is contended that the reversal of the original judgment, upon which the proceedings in this record took place, requires necessarily the reversal of this judgment. The general doctrine is undeniably so; but the application of it to this case is not admitted. That the judgment in this record is dependent upon some other judgment, is apparent from the bond which recites a prior execution and seizure, by the marshal, of the property mentioned in the condition, for the purpose of satisfying it; but it does not appear judicially to the court that the recited execution issued upon the identical judgment which has been reversed. The only difficulty which the court has felt has been to devise some proper mode in this, as well as in all similar cases which may hereafter arise, to connect with the original reversed judgment that which is asserted to be dependent upon it.

A *certiorari* upon a suggestion of diminution would not answer the purpose, as the proceedings in the original suit form no part of those in the subsequent suit; the only foundation of which are, the bond and notice. Neither does it appear regular for this court to receive as evidence of the dependency of the latter upon the former judgment, the certificate of the clerk of the circuit court.

The court has thought it best to direct a special writ to be framed applicable to cases of this nature, to be directed to the clerk of the court in which the judgments were rendered, to certify under the seal of the * court, the execution recited in the bond on which the second judgment was rendered. This difficulty can never occur except in cases where all the proceedings in the original judgment, except the execution, are already before this court. The execution, therefore, though no part of either the original or dependent record, being certified by the proposed writ, will supply the only link necessary to prove the connection between the two judgments.

[*290]

In this case, the court, from the novelty of the practice necessary to be adopted, will not permit the plaintiff in error to suffer in consequence of his not having applied sooner for a writ of *certiorari*, but will now direct the same to issue. In future, the party must take the consequences of his neglect, if he should fail to have the execution certified in time.

March 16. WASHINGTON, J. The court has examined the execution which has been sent up by *certiorari*, and is satisfied that the

judgment on which it issued is that which was reversed at the last term. The judgment, therefore, on the forthcoming bond, must be reversed also.

Judgment reversed.

MIMA QUEEN and CHILD, Petitioners for Freedom, *v.* HEPBURN.

7 C. 290.

Hearsay evidence is incompetent to establish a specific fact, which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge. Claims to freedom in Maryland are not exempt from that general rule.

After a juror is sworn, no exception can be taken to him by a party, on account of his being an inhabitant of another county.

If a juror be challenged for favor, and, upon examination before the tryers, he declare that, if the evidence should be equal, he should give a verdict in favor of that party upon whom the burden of proof lies, the court, in the exercise of a sound discretion, ought to reject him, although the bias should not be so strong as to render it positively improper to allow him to be sworn.

ERROR to the circuit court for the District of Columbia, sitting at Washington.

At the trial, several bills of exception were taken, the substance whereof is given in the opinion of the court.

* *F. S. Key* and *Morsell*, for the plaintiffs in error. [* 291]

* *Law* and *Jones*, contrà. [* 292]

* MARSHALL, C. J., delivered the opinion of the court, as [* 293] follows: —

This was a suit instituted by the plaintiffs in the circuit court of the United States for the county of Washington, in which they claim freedom. On the trial of the issue, certain depositions were offered by the plaintiffs which were rejected by the court, and exceptions were taken. The verdict and judgment being rendered for the defendants, the plaintiffs have brought the cause into this court by writ of error, and the case depends on the correctness of the several opinions given by the circuit court.

* The first opinion of the court to which exception was [* 294] taken, was for the rejection of part of the deposition of Caleb Clarke, who deposed to a fact which he had heard his mother say she had frequently heard from her father.

The second exception is to the opinion overruling part of the de-

position of Freeders Ryland, which stated what he had heard Mary, the ancestor of the plaintiffs, say respecting her own place of birth and residence.

The fifth exception is substantially the same with the second. The question is somewhat varied in form, and the testimony given by the defendant, to which no exception was taken, is recited, and the hearsay evidence is then offered as historical; but the court perceives no difference, in law, between the second and fifth exceptions.

The sixth exception is taken to an instruction given by the court to the jury on the motion of the counsel for the defendants. The plaintiffs had read the deposition of Richard Disney, who deposed that he had heard a great deal of talk about Mary Queen, the ancestor of the plaintiffs, and has heard divers persons say that Captain Larkin brought her into this country, and that she had a great many fine clothes, and that old William Chapman took her on shore once, and that nobody would buy her for some time, until at last James Caroll bought her.

Whereupon the defendant's counsel moved the court to instruct the jury that if they find the existence of this report and noise was not stated by the witness from his knowledge, but from what had been communicated to him respecting the existence of such a report and noise many years after her importation, without its appearing by whom or in what manner the same was communicated to him, then the evidence is incompetent to prove either the existence of such report and noise or the truth of it; which instruction the court gave.

The plaintiffs also read the deposition of Thomas Warfield, who deposed that John Jiams, an inspector of tobacco, told him [*295] that Mary, the ancestor of the plaintiffs, * was free, and was brought into this country by Captain Larkin, and was sold for seven years. The court instructed the jury that if they should be satisfied upon the evidence that these declarations of John Jiams were not derived from his own knowledge, but were founded on hearsay or report communicated to him many years after the importation and sale of the said Mary, without its appearing by whom or in what manner such communication was made to him; then his said declarations are not competent evidence in this cause. To these instructions the counsel for the plaintiffs excepted.

These several opinions of the court depend on one general principle, the decision of which determines them all. It is this: That hearsay evidence is incompetent to establish any specific fact, which fact is in its nature susceptible of being proved by witnesses who speak from their own knowledge.

However the feelings of the individual may be interested on the part of a person claiming freedom, the court cannot perceive any legal distinction between the assertion of this and of any other right, which will justify the application of a rule of evidence to cases of this description which would be inapplicable to general cases in which a right to property may be asserted. The rule, then, which the court shall establish in this cause will not, in its application, be confined to cases of this particular description, but will be extended to others where rights may depend on facts which happened many years past.

It was very justly observed by a great judge, that "all questions upon the rules of evidence are of vast importance to all orders and degrees of men; our lives, our liberty, and our property, are all concerned in the support of these rules, which have been matured by the wisdom of ages, and are now revered from their antiquity and the good sense in which they are founded."

One of these rules is, that "hearsay" evidence is in its own nature inadmissible. That this species of testimony supposes some better testimony which might be adduced in the particular case, is not the sole ground * of its exclusion. Its intrinsic weak- [*296] ness, its incompetency to satisfy the mind of the existence of the fact, and the frauds which might be practised under its cover, combine to support the rule that hearsay evidence is totally inadmissible.

To this rule there are some exceptions which are said to be as old as the rule itself. These are cases of pedigree, of prescription, of custom, and in some cases, of boundary. There are also matters of general and public history which may be received without that full proof which is necessary for the establishment of a private fact.

It will be necessary only to examine the principles on which these exceptions are founded, to satisfy the judgment that the same principles will not justify the admission of hearsay evidence to prove a specific fact, because the eye-witnesses to that fact are dead. But if other cases standing on similar principles should arise, it may well be doubted whether justice and the general policy of the law would warrant the creation of new exceptions. The danger of admitting hearsay evidence is sufficient to admonish courts of justice against lightly yielding to the introduction of fresh exceptions to an old and well-established rule; the value of which is felt and acknowledged by all.

If the circumstance that the eye-witnesses of any fact be dead should justify the introduction of testimony to establish that fact, from hearsay, no man could feel safe in any property, a claim to which might be supported by proof so easily obtained.

This subject was very ably discussed in the case of The King against the Inhabitants of Eriswell, 3 T. R. 707, where the question related to the fact that a pauper had gained a residence, a fact which it was contended might be proved by hearsay evidence. In that case the court was divided, but it was afterwards determined that the evidence was inadmissible.

This court is of the same opinion.

The general rule comprehends the case, and the case is [*297] not within any exception heretofore recognized. * This court is not inclined to extend the exceptions further than they have already been carried.

There are other exceptions taken which appear on the record, but were not much relied upon in argument.

The third exception is to the qualification of one of the jurors. He was called as a talesman, and was stated to be an inhabitant of the county of Alexandria, not of Washington. The court decided that he was a proper juryman, and he was sworn. After his being sworn the objection was made by the plaintiff's counsel, and an exception was taken to the opinion of the court.

Whatever might have been the weight of this exception if taken in time, the court cannot sustain it now. The exception ought to have been made before the juror was sworn.

The fourth exception also applies to an opinion given by the circuit court, respecting the service of one of the persons summoned as a juror. James Reed, when called, was questioned, and appeared to have formed and expressed no opinion on the particular case; but on being further questioned, he avowed his detestation of slavery to be such that, in a doubtful case, he would find a verdict for the plaintiffs; and that he had so expressed himself with regard to this very cause. He added, that if the testimony were equal, he should certainly find a verdict for the plaintiffs. The court then instructed the tryers that he did not stand indifferent between the parties. To this instruction an exception was taken.

It is certainly much to be desired that jurors should enter upon their duties with minds entirely free from every prejudice. Perhaps on general and public questions it is scarcely possible to avoid receiving some prepossessions, and where a private right depends on such a question, the difficulty of obtaining jurors whose minds are entirely uninfluenced by opinions previously formed is undoubtedly considerable. Yet they ought to be superior to every exception, they ought to stand perfectly indifferent between the parties; and although the bias which was acknowledged in this case [*298] might not * perhaps have been so strong as to render it

positively improper to allow the juror to be sworn on the jury, yet it was desirable to submit the case to those who felt no bias either way; and therefore the court exercised a sound discretion in not permitting him to be sworn.

There is no error in the proceedings of the circuit court, and the judgment is affirmed.

DUVALL, J. The principal point in this case is upon the admissibility of hearsay evidence. The court below admitted hearsay evidence to prove the freedom of the ancestor from whom the petitioners claim, but refused to admit hearsay of hearsay. This court has decided that hearsay evidence is not admissible to prove that the ancestor from whom they claim was free. From this opinion I dissent.

In Maryland, the law has been for many years settled, that on a petition for freedom, where the petitioner claims from an ancestor who has been dead for a great length of time, the issue may be proved by hearsay evidence, if the fact is of such antiquity that living testimony cannot be procured. Such was the opinion of the judges of the general court of Maryland, and their decision was affirmed by the unanimous opinion of the judges of the high court of appeals in the last resort, after full argument by the ablest counsel at the bar. I think the decision was correct. Hearsay evidence was admitted upon the same principle, upon which it is admitted to prove a custom, pedigree, and the boundaries of land; because, from the antiquity of the transactions to which these subjects may have reference, it is impossible to produce living testimony. To exclude hearsay in such cases, would leave the party interested without remedy. It was decided also that the issue could not be prejudiced by the neglect or omission of the ancestor. If the ancestor neglected to claim her right, the issue could not be bound by length of time, it being a natural inherent right. It appears to me that the reason for admitting hearsay evidence upon a question of freedom is much stronger than in cases of pedigree, or in controversies relative to the boundaries of land. It will be * universally admitted that the right to freedom is more important than the right of property. [*299]

And people of color, from their helpless condition under the uncontrolled authority of a master, are entitled to all reasonable protection. A decision that hearsay evidence in such cases shall not be admitted, cuts up by the roots all claims of the kind, and puts a final end to them, unless the claim should arise from a fact of recent date, and such a case will seldom, perhaps never, occur.

1 W. 6; 5 P. 81 · 10 P. 412.

The Bank of Columbia v. Patterson's Administrator.

7 C. 299.

Upon a special contract executed on the part of the plaintiff, *indebitatus assumpsit* will lie for the price.

A simple contract is not merged in a sealed instrument, which merely recognizes the debt, and fixes the mode of ascertaining its amount.

Upon general counts, a special agreement executed may be given in evidence.

The recital of a prior, in a later agreement, after it has been executed, does not extinguish the former.

Wherever a corporation aggregate is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action lies.

Error to the circuit court for the District of Columbia, in an action of *indebitatus assumpsit*, brought by the defendant in error against the president, directors, and company of the Bank of Columbia, in their corporate capacity. There were four counts only in the declaration.

1st. *Indebitatus assumpsit*, for matters properly chargeable in account. 2d. *Indebitatus assumpsit*, for work and labor done. 3d. *Quantum meruit;* and 4th. *Insimul computassent.*

The defendant pleaded *non assumpsit*, and a tender.

On the trial below, the defendant took three bills of exceptions.

The 1st stated, that the plaintiff read in evidence a sealed agreement, dated 10th December, 1807, between Patterson and a duly authorized committee of the directors of the bank, under their private seals. It recites, that a difference of opinion had arisen [*300] between * Patterson and the committee for building the new banking-house, as to certain work extra of an agreement made between Patterson and the said committee, in 1804, and thereto annexed; whereupon it was agreed, that all the work done by Patterson should be measured and valued by two persons therein mentioned, according to certain rates, called in Georgetown, old prices, and the sum certified by them should be taken by both parties, in their settlement, as the amount thereof. It was also thereby agreed, that the outhouses, respecting which there had been no specific agreement, should be measured and valued by the same persons in the same manner. The agreement of 1804, referred to in and annexed to the agreement of 1807, was also offered in evidence by the plaintiff, and states, that Patterson had agreed with the committee to do all the carpenter's work required, agreeably to the plan of the new bank, and

states particularly the manner in which it was to be done; and that "in consideration of the work being done" as stated, the committee agreed to pay Patterson $3,625, as full consideration; and that if, when the work should be finished, the committee should be of opinion that that sum was too much, Patterson agreed to have the work measured, at the expense of the bank, by two persons mutually appointed, who should take the old prices as the standard, and in case the bill of measurement did not amount to the sum of $3,625, Patterson agreed to take the amount of measurement for full satisfaction. The plaintiff then read in evidence a paper of particulars of the work, certified by the persons named in the agreement of 1807. The defendants offered in evidence the plan of the building, and that it was built principally according to that plan, and the agreement; and that any work other than that stated in the plan and agreement, was to be charged separately as extra work, and that it was so charged by Patterson, before the 10th of December, 1807, the date of the second agreement, who presented the account (so charged) to the defendants, claiming the amount of the same, and claiming also for the work done under the agreement of 1804, the sum of $3,625, and proved that while the work was going on the defendants paid Patterson sundry large sums of money on account thereof.

*The court was thereupon prayed by the defendants to [*301] instruct the jury, that if they believed that the agreement of 1804 was assented to by Patterson and the committee as binding between them, and that the work therein contracted for was done by Patterson, and that the sum of $3,625, therein mentioned, was claimed by him on account of the same, then the plaintiff could recover for no such work, but could only recover for the work done, extra of the said agreement; which instruction the court refused to give.

The second bill of exceptions states, that the defendants, upon the same evidence, prayed the court to instruct the jury, that the plaintiff was not entitled to recover under any of the counts; which instruction the court refused to give, but declared that the evidence was competent.

The third bill of exceptions states, that the defendants prayed the court to instruct the jury, upon the same evidence, that the plaintiff could not recover, unless he should prove that the defendants, after the measurement and valuation, expressly promised to pay the amount *thereof to the plaintiff; and that the jury [*302] could not, from the evidence offered, presume any such promise. This instruction the court also refused.

Morsell and *Key*, for the plaintiffs.

Jones and *C. Lee*, for the defendants.

STORY, J., delivered the opinion of the court, as follows:—

Several exceptions have been taken to the opinion of the court below, which will be considered in the order in which the objections arising out of them have been presented to us. We are sorry to say, that the practice of filing numerous bills of exceptions is very [*303] *inconvenient; for all the points of law might be brought before the court in a single bill, with a simplicity, which would relieve the bar and the bench from every unnecessary embarrassment.

As the argument on the first exception has proceeded upon the ground that the agreement of 1804 was completely executed and performed, and the objection relates only to a supposed mistake in the form of the declaration, it will at present be considered in this view. And we take it to be incontrovertibly settled, that *indebitatus assumpsit* will lie to recover the stipulated price due on a special contract, not under seal, where the contract has been completely executed; and that it is not in such case necessary to declare upon the special agreement. Gordon *v.* Martin, Fitzgibbon, 303; Mussen *v.* Price, 4 East, 147; Cook *v.* Munstone, 4 Bos. & Pul. 351; Clarke *v.* Gray, 6 East, 564, 569; 2 Sand. 350, note 2. In the case before the court, we have no doubt that *indebitatus assumpsit* was a proper form of action to recover, as well for the work done under the contract of 1804, as for the extra work. It may, therefore, safely be admitted (as is contended by the plaintiff in error) that where there is a special agreement for building a house, and some alterations or additions are made, the special agreement shall, notwithstanding, be considered as subsisting so far as it can be traced. Pepper *v.* Burland, Peake's Rep. 103. The first exception, therefore, wholly fails.

Under the second exception, the plaintiff in error has made various objections.

1. The first is, that though a promise would be implied by law, for the extra work against the corporation, yet that such promise was extinguished, by operation of law, by the provisions of the sealed contract of 1807. It is undoubtedly true, that a security under seal extinguishes a simple contract debt, because it is of a higher nature. Cro. Car. 415; Raym. 449; 2 Jones, 158; 1 Bur. 9; 5 Com. Dig. tit. Plead. 2 G. 12. But this effect never has been attributed to a sealed instrument which merely recognizes an existing debt, and provides a mode to ascertain its amount and liquidation. At [*304] most, the sealed agreement of 1807 could not be *construed to extend beyond this import. In no sense could it be con-

sidered as a higher security for the money originally due. This objection therefore cannot prevail, even supposing that the agreement were the deed of the corporation.

2. A second objection is, that the special agreements, connected with the certificates of admeasurement, were inadmissible evidence under the general counts, and could be admissible only under counts framed on the special agreements.

To this objection an answer has already, in part, been given. And we would further observe, that if the agreements connected with the admeasurements, were the means of ascertaining the value of the work, the evidence was pertinent under every count. 2 Saund. 121, note 2. And if the certificates of admeasurement were of the nature of an award, they were clearly admissible under the *insimul computassent count.* Keen *v.* Batshore, 1 Esp. Rep. 194.

3. Another objection is, that as the agreement of 1807 is sealed, and is connected, by reference with the prior agreement, they are to be construed as one sealed instrument, and *assumpsit* will not lie upon an instrument under seal.

The foundation of this objection utterly fails, for the agreement is not under the seal of the corporation, but the seals of the committee; and if it were otherwise, it is too plain for argument, that the original agreement was not extinguished, but referred to as a subsisting agreement. It is quite impossible to contend that the mere recital of a prior, in a later agreement, after it has been executed, extinguishes the former.

Two other objections are made under this exception; but as they are answered in the preceding observations, it is unnecessary to notice them farther.

Under the third exception, the only objections relied on, are in principle the same as the objections urged under the former exceptions, and they admit the same answers.

* The case has thus been considered all along, as though [*305] the contracts were made between the plaintiff's administrator and the corporation, and indeed some points in the argument have proceeded upon this ground. It is very clear, however, that neither the first nor second agreements were made by the corporation, but by the committee, in their own names. In consideration of the work being done, the committee, and not the corporation, personally and expressly agree to pay the stipulated price. A question has therefore occurred, how far the corporation were capable of contracting, except under their corporate seal; and if it were capable, as no special agreement is found in the case, how far the facts proved show an express or an implied contract on the part of the corporation.

Anciently, it seems to have been held, that corporations could not do any thing without deed. 13 H. 8, 12; 4 H. 6, 7; 7 H. 7, 9.

Afterwards, the rule seems to have been relaxed, and they were, for conveniency's sake, permitted to act in ordinary matters without deed; as to retain a servant, cook, or butler. Plow. 91, b.; 2 Sand. 305; and gradually this relaxation widened to embrace other objects. Bro. Corp. 51; 1 Salk. 191; 3 Lev. 107; Moore, 512. At length, it seems to have been established, that though they could not contract directly, except under their corporate seal, yet they might by mere vote or other corporate act, not under their corporate seal, appoint an agent, whose acts and contracts, within the scope of his authority, would be binding on the corporation. Rex *v.* Bigg, 3 P. Wms. 419; and courts of equity, in this respect seeming to follow the law, have decreed a specific performance of an agreement made by a major part of a corporation, and entered in the corporation books, although not under the corporate seal, 1 Fonb. 296, Phil. ed. note (o.) The sole ground upon which such an agreement can be enforced, must be the capacity of the corporation to make an unsealed contract.

As it is conceded, in the present case, that the committee were fully authorized to make agreements, there could then be no doubt, that a contract made by them in the name of the corporation, and [*306] not in their own names, *would have been binding on the corporation. As, however, the committee did not so contract, if the principles of law on this subject stopped here, there would be no remedy for the plaintiff, except against the committee.

The technical doctrine, that a corporation could not contract, except under its seal, or, in other words, could not make a promise, if it ever had been fully settled, must have been productive of great mischiefs. Indeed, as soon as the doctrine was established that its regularly appointed agent could contract in their name without seal, it was impossible to support it; for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law, that wherever a corporation is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents, are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action may well lie. And it seems to the court, that adjudged cases fully support the position. Bank of England *v.* Moffat, 3 Bro. Ch. Rep. 262; Rex *v.* Bank of England, Doug. 524, and note ib.; Gray *v.* Portland Bank, 3 Mass. Rep. 364; Worcester Turnpike Corporation *v.* Willard, 5 Mass. Rep. 80; Gilmore *v.* Pope, 5 Mass. Rep. 491; Andover & Medford Turnpike Corporation *v.* Gould, 6 Mass. Rep. 40.

In the case before the court, these principles assume a peculiar importance. The act incorporating the Bank of Columbia, (act of Maryland, 1793, ch. 30,) contains no express provision authorizing the corporation to make contracts. And it follows, that upon principles of the common law, it might contract under its corporate seal. No power is directly given to issue notes not under seal. The corporation is made capable to have, purchase, receive, enjoy, and retain, lands, tenements, hereditaments, goods, chattels, and effects, of what kind, nature, or quality, soever, and the same to sell, grant, demise, alien, or dispose of — and the board of directors are authorized to determine the manner of doing business, and the rules and forms to be pursued; to appoint and pay the various officers, and dispose of * the money or credit of the bank, in [* 307] the common course of banking, for the interest and benefit of the proprietors. Unless, therefore, a corporation, not expressly authorized, may make a promise, it might be a serious question, how far the bank notes of this bank were legally binding upon the corporation, and how far a depositor in the bank could possess a legal remedy for his property confided to the good faith of the corporation. In respect to insurance companies also, it would be a difficult question to decide, whether the law would enable a party to recover back a premium, the consideration of which had totally failed. Public policy therefore, as well as law, in the judgment of the court, fully justifies the doctrine which we have endeavored to establish. Indeed, the opposite doctrine, if it were yielded to, is so purely technical, that it could answer no salutary purpose, and would almost universally contravene the public convenience. Where authorities do not irresistibly require an acquiescence in such technical niceties, the court feel no disposition to extend their influence.

Let us now consider what is the evidence in this case, from which the jury might legally infer an express or an implied promise of the corporation. The contracts were for the exclusive use and benefit of the corporation, and made by their agents for purposes authorized by their charter. The corporation proceed, on the faith of those contracts, to pay money from time to time to the plaintiff's intestate. Although, then, an action might have laid against the committee personally, upon their express contract, yet as the whole benefit resulted to the corporation, it seems to the court, that from this evidence the jury might legally infer that the corporation had adopted the contracts of the committee, and had voted to pay the whole sum which should become due under the contracts, and that the plaintiff's intestate had accepted their engagement. As to the extra work,

respecting which there was no specific agreement, the evidence was yet more strong to bind the corporation.

In every way of considering the case, it appears to the court that there was no error in the court below, and that the judgment ought to be affirmed.

8 W. 338; 9 W. 738; 12 W. 64; 9 P. 541; 6 H. 301.

[* 308] CLARK'S EXECUTORS *v.* CARRINGTON.

7 C. 308.

A judgment against the person to be indemnified, fairly recovered, is admissible, in a suit on the contract of indemnity.

The assignee of one share of a pending mercantile adventure, who makes an express promise to the managing partner to assume the liability to him of the assignor, on which the managing partner acts, by thereafter prosecuting the adventure, treating the assignee as his copartner, is liable to an action at law on such promise.

ERROR to the circuit court for the district of Rhode Island, in an action of *assumpsit*, brought by Carrington against Clark, in his life time, and prosecuted against his executors, after his decease, to recover from them five ninths of the amount of a judgment recovered by Smith & Co., of Hamburg, against Carrington, upon a claim against him jointly with Greene & Barker, and J. C. Nightingale; Carrington having paid the whole.

The declaration contained the usual money counts, and several counts upon a special undertaking by Clark to comply with the contract between Greene & Barker, and Carrington, which contract was averred to be to pay all debts contracted by Carrington with Smith & Co., on account of the owners of the ship Abigail, in the proportion in which they are interested therein; the owners being Greene & Barker, for five ninths, J. C. Nightingale for two and a half ninths, and Carrington for one and a half ninths; Clark having received from Greene & Barker, who had become insolvent, an assignment of their share in the ship and cargo; and Carrington having paid over to Clark, five ninths of the proceeds thereof.

A bill of exceptions was taken to the opinion of the court below, and to the admission in evidence of a letter from Clark to Smith & Co., of the 30th of June, 1800 — and of a letter from Greene & Barker, to Smith & Co., of the 12th of July, 1800 — and of the writ,

proceedings, and judgment, in the suit of Smith & Co. against Greene & Barker, J. C. Nightingale and Carrington.

The letter of 30th June, 1800, from Clark to Smith & Co., says: "This will be handed to you by Mr. Edward Carrington, who goes supercargo of the ship Abigail, of which he is a part owner in company with Messrs. Greene & Barker, and John C. Nightingale. *They have concluded to send their ship on freight to [*309] your city, where, having no correspondent, I do myself the pleasure of recommending them to your notice. Mr. Carrington proposes continuing in the ship, and it is probable will require your advice and assistance in the voyage which he intends carrying into execution. I have ever found these gentlemen persons of strict integrity, and I doubt not will punctually fulfil any engagements they may enter into with you."

The letter of the 12th of July, 1800, from Greene & Barker to Smith & Co., is as follows: —

"New York, 12th July, 1800.

"Messrs. George Smith & Co.

"Gentlemen: By the recommendation of our mutual friend, Mr. John Innes Clark, of Providence, we are induced to make an acquaintance with your house; and we have accordingly recommended Mr. Edward Carrington, supercargo of the ship Abigail, (of which he, together with Mr. John C. Nightingale and ourselves are owners,) to call on you for the necessary aid he may require while in your city. We have opened our plans of a voyage for The Abigail to your Mr. Adamson, which he doubts not you will readily coincide with, and render Mr. Carrington the necessary aid he may require. We shall consider ourselves responsible for all contracts which Mr. Carrington may make in the business of this ship, and anticipate the pleasure of your being well satisfied with his strict fulfilment of them. We have handed your Mr. Adamson bills of lading for a parcel of dye-wood, shipped in The Abigail, with an order to get one thousand pounds sterling insured on her cargo and freight, and shall draw on you in consequence for seven hundred and fifty pounds sterling.

"We are, your most obedient servants,

"Greene & Barker.

"Please effect the above insurance, if not already done.

"Wm. Adamson."

*The record of the proceedings in the suit of Smith & [*310] Co. v. Carrington and others, was objected to because Clark was not a party to it. But it was proved that Clark had a power of attorney from Carrington, who was in Canton, and conducted the defence of that suit in his behalf.

The evidence principally relied on by the plaintiff in support of his action was a letter from Clark to him of the 16th of March, 1801, written at Providence. That part of the letter which relates to the subject is given in the opinion of the court.

[*311] *The important part of the answer of Carrington to this letter is also given in the opinion of the court.

Carrington, while at Hamburg, in order to procure a cargo [*312] for the ship, had obtained credit with Smith *& Co., to a large amount, upon the hypothecation of the ship by a bottomry bond, and upon agreeing to return to Hamburg with a cargo; for which purpose he engaged Smith & Co. to procure insurance to be made in a large sum upon his return voyage. The premium on this insurance constituted a considerable part of the debt due to Smith & Co., upon which they recovered judgment against Carrington, as before stated. One of the grounds of defence taken by Clark's executors, was that Carrington had neglected to give notice to Smith & Co. of the dereliction of the return voyage in due time to save that premium of insurance, and therefore he alone ought to suffer by it. The judge, in the court below, in charging the jury, (as the manner is in Rhode Island,) said: "Great blame is attempted to be thrown on Mr. Carrington for not giving notice to George Smith & Co. that he had changed his voyage so as to prevent the insurance being made from Havana to Hamburg; and the defendants say that for his neglect in not giving such timely notice, he ought alone to pay the whole of that premium — of this you will judge." The judge also said: "I conceive the case to be clear, that as Greene & Barker were interested five ninths in the voyage, they were bound to indemnify Mr. Carrington in the same proportion for the damage he should sustain by the contract with George Smith & Co." And again he says: "If Mr. Clark received from Mr. Carrington more than five ninths of the surplus after paying the company's debts, and Mr. Carrington has since been obliged to pay those debts, Mr. Clark is bound to refund his proportion."

The judge finally concludes his charge in this manner: —

"Having gone through the case at great length, and conceiving it on the whole to rest principally on questions of law, I will give you my opinion explicitly upon them, so that if your verdict should be against the defendants, they may have an opportunity to bring the cause before the supreme court.

"I conceive that Mr. Clark's letter, bearing date March 16, 1801, at Providence, and directed to Mr. Carrington, at Havana, [*313] and received by him 22d of *April, 1801, taken in connection with the other evidence in the case, ought to be con-

sidered as a letter of guaranty, and binding Mr. Clark to pay five ninth parts of the debt due to George Smith & Co., as ascertained by the judgment in their favor against Mr. Carrington.

"I am also of opinion that Mr. Clark having received of Mr. Carrington a large sum of money, under and by virtue of the assignment, from Greene & Barker, of their interest in the ship Abigail and cargo, was bound, under the circumstances of this case, as made out and established by the evidence, to refund the same, or so much thereof as would amount to five ninth parts of the debt due to George Smith & Co. What sum Mr. Clark received, is a question of fact proper for you to decide."

The verdict and judgment being against the defendants, they sued out their writ of error.

C. Lee and *Jones*, for the plaintiffs.

Stockton and *Hunter*, for the defendant.

*MARSHALL, C. J., delivered the opinion of the court, as [*320] follows: —

This cause comes on now to be heard,

1st. On exceptions to the opinion of the circuit court permitting certain exhibits produced by the defendants in error, to go to the jury.

2d. On exceptions to the charge delivered by the judge, to the jury.

*The first exhibit, to which the plaintiffs in error objected, [*321] was a letter written by their testator to George Smith & Co., of Hamburg, which respects the transaction on which the present suit is founded. This letter is said to be irrelevant.

The second is a letter written by Greene & Barker (whose interest the testator of the plaintiffs held as assignee) to George Smith & Co., making themselves responsible for the contract of Carrington.

This letter is said to be inadmissible, because it is between other parties, and relates to a contract between Carrington and George Smith & Co.

The third is a judgment obtained by George Smith & Co. against Edward Carrington, the defendant in error, on his transactions as a copartner with Greene & Barker, which were guaranteed by them. The objection to this exhibit also is, that it is the record of proceedings in a suit between other parties.

The court is unanimous and clear in the opinion, that neither of these exceptions is sustained.

The letter of John J. Clark to George Smith & Co., is admissible, because it is part of the correspondence relative to the transactions out of which the present suit has grown, and because it affords a strong implication that the writer was acquainted with the obligation of Greene & Barker, whose interest he claims, to comply with the engagements of Carrington, their copartner and supercargo. It cannot, therefore, be deemed irrelevant.

The letter of Greene & Barker to George Smith & Co. is admissible, because it tends to show the obligation of Greene & Barker (whose interest in The Abigail and her cargo is claimed by John Innes Clark) to perform the engagements of Carrington, and is a proper link in that chain of testimony which was adduced to prove that those engagements passed, with the interest of Greene & Barker in The Abigail and her cargo, to John Innes Clark.

[*322] *The judgment obtained by George Smith & Co. was admissible, because it was founded on the contracts of Carrington with George Smith & Co., for which Greene & Barker were liable. It was a material document to ascertain the amount to which George Smith & Co. were entitled, as against Carrington, and was therefore a part of the testimony which would be required to show for how much Greene & Barker were responsible when they assigned to John Innes Clark. It was certainly admissible, for these purposes, because Greene & Barker were in truth copartners with Carrington, and because, if they were not, it is a case of warranty and indemnity; and, in such case, a judgment against the person to be indemnified, if fairly obtained, especially if obtained on notice to the warrantor, is admissible in a suit against him on his contract of indemnity. Whether it was admissible against John Innes Clark, depends on the degree of his liability for the money for which that judgment was rendered. If the obligation to indemnify passed to him with the interest of Greene & Barker, either on his express undertaking contained in his letter of March, 1801, or in consequence of any equitable lien on the vessel and cargo, or on the money produced by them, which attached, while the property of Greene & Barker, and was not affected by the assignment, then these proceedings were admissible in a suit against him.

If no such liability existed, then the action could not be sustained, and the judgment would be reversed on the charge of the judge. This point, therefore, will be considered in that part of the case.

In his charge, after summing up the testimony offered by both parties, the judge proceeds to say: "I conceive that Mr. Clark's letter, bearing date March 16th, 1801, at Providence, and directed to Mr. Carrington, at Havana, and received by him the 22d of April, 1801,

taken in connection with the other evidence in the case, ought to be considered as a letter of guaranty, and binding Mr. Clark to pay five ninth parts of the debt due to George Smith & Co., as ascertained by the judgment in their favor against Mr. Carrington. I am also of opinion that Mr. Clark, having received of Mr. Carrington a large sum of money, under and by virtue of the assignment from Greene & Barker, of their *interest in the ship Abigail [*323] and cargo, was bound under the circumstances of this case, as made out and established by the evidence, to refund the same, or so much thereof as would amount to five ninth parts of the debt due to George Smith & Co. What sum Mr. Clark received, is a question of fact, proper for you to decide."

The declaration in this cause contains five general counts, and three special counts founded on the letter of March 16th, 1801, which the judge considered as a letter of guaranty binding John Innes Clark to pay five-ninth parts of the debt due to George Smith & Co.

The first part of the charge is supposed, by a part of the court, to apply to the special counts, and to determine the right of the plaintiff below to recover under them; the latter part of the charge, to the general counts, and to determine his right to recover under them.

If the letter of the 16th of March, 1801, bound John Innes Clark to perform the contract of Greene & Barker, then he was liable to the extent of Greene & Barker's liability, and was bound to pay whatever they were bound to pay, although it might exceed the proceeds of The Abigail and cargo.

If that letter did not support the special counts, if with the other circumstances of the case it did not amount to such a contract as was stated in the declaration, then Carrington could only recover on his general counts, and could obtain a judgment for no more than had been received by Clark.

Others of the court are of opinion, that the charge does not import that, in any state of the accounts, Clark was bound to pay more than he had received.

A decision of this point is rendered unnecessary by the opinion of the court on the letter of the 16th of March, 1801.

The important part of that letter is in these words: "With respect to the ship, notwithstanding I have a bill of sale from Greene & Barker, of two thirds, I *shall view you (if you [*324] return here with her) as the owner of such proportion as agreed upon between you and them; and I give you my word that you shall receive from me any aid and support, in settling the business to mutual satisfaction, that is in my power. Mr. John Corlis, who has undertaken to conduct the business for Mr. John C. Night-

ingale, writes you by this opportunity, and will assure you in his behalf, of one sixth of one third from him, that is to say, to make you an owner in the whole ship Abigail, and appurtenances of one complete sixth, and the same proportion in the cargo; and Greene & Barker's contract with you, shall, in every respect, be fully complied with, the same as it would have been done with them, had they continued owners."

What was Greene & Barker's contract with Carrington?

It is observable, that neither in this letter nor in any other part of the proceedings, is there any evidence that Greene & Barker had made with Carrington more than one contract respecting this voyage.

A part of this contract, as is apparent from the letter of Mr. Clark, entitled Carrington to one sixth part of The Abigail, and of the cargo to be taken on board at Hamburg. The letter of the 12th of July, 1800, addressed by Greene & Barker to George Smith & Co., states Carrington to be a part owner of the vessel which was sent to Hamburg on freight, wishes them to render Carrington the necessary aid he may require, and adds, "we shall consider ourselves responsible for all contracts Mr. Carrington may make in the business of this ship, and anticipate the pleasure of your being well satisfied with his strict fulfilment of them."

It seems a necessary inference from the condition and object of the parties, that this letter was written in pursuance of, and conformity with, the contract between Greene & Barker and Carrington, and that their responsibility, "for all contracts Mr. Carrington might make in the business of the ship," was as much a part of their engagement with him, as the agreement that he should be interested one sixth in the vessel and cargo.

[*325] *This undertaking was known to Mr. Clark. His letter of the 30th of June, 1800, introducing Carrington to George Smith & Co., recommends Greene & Barker and Nightingale as the persons on whom G. Smith & Co. were to rely for the fulfilment of the engagements made by Carrington. "I have ever found these gentlemen," says he, "persons of strict integrity, and I doubt not will punctually fulfil any engagements they may enter into with you." Clark knew then that Greene & Barker had bound themselves to be responsible for the contracts of Carrington with George Smith & Co., and alluded to this residue of their contract with Carrington, when, after saying that he should consider Carrington as the owner of such proportion of the ship as was agreed on between him and them, and that Mr. Corlis, who represented Nightingale, would do the same, he adds, "and Greene & Barker's contract with you shall in every respect be complied with."

The subsequent conduct of Clark certainly proves that he never understood himself to be entitled to more, by the assignment of The Abigail and her cargo, than would remain after discharging the contracts entered into by Carrington.

The record abounds with proofs of this position, which have been much pressed at the bar, of which the court will select only one. It is the letter from Carrington to Clark, dated Havana, April 22d, 1801, in which he acknowledges the receipt of Clark's letter of the 16th of March of the same year. He states the lien upon the ship and cargo, and adds, "but I presume, and doubt not, Messrs. Greene & Barker have acquainted you with the exact situation of them, and have only disposed to you that part of the ship and cargo that may remain after the bottomry bond is settled and discharged."

At this information, Mr. Clark expresses no surprise; nor does he manifest any dissatisfaction at the conclusion Carrington had drawn respecting the terms on which he had succeeded to the rights of Greene & Barker. This is considered as further explaining his meaning in using the terms, "and Greene & Barker's contract with you shall in every respect be complied with."

* Upon these grounds, it is the opinion of the majority of [*326] the court, that the letter of the 16th of March, 1801, contains a contract, binding John Innes Clark to perform the whole contract of Greene & Barker with Carrington, a part of which was to pay five ninth parts of the debt contracted on account of The Abigail and her cargo, with George Smith & Co.; consequently, the plaintiffs in error were responsible to Carrington, as far as Greene & Barker were responsible.

It has been contended for the plaintiffs in error, that a considerable part of the debt to George Smith & Co. (the premium of insurance on a return voyage to Hamburg) was incurred in consequence of the gross negligence of Carrington in not countermanding the order for insurance as soon as he determined to change the voyage. For this sum it is contended Greene & Barker could not have been liable to Carrington, and consequently it cannot be recovered from John Innes Clark.

One of the judges is of opinion that the question of negligence is, in this case, a point of law, Carrington having been a copartner with Greene & Barker, and therefore proper for the decision of the court; others think that the judge has left that question with the jury.

In summing up the evidence the judge says: "The defendants say, that for his (Carrington's) neglect in not giving such timely notice, (of the change of the voyage,) he ought himself to pay the whole of the premium. Of this you will judge."

This explicit declaration is considered as not being overruled by the concluding part of the charge.

If the fact of negligence was left to the jury, they have decided it in the negative, and the question whether a partner would in such a case be responsible to his copartners for negligence in failing to countermand an order for insurance, does not arise in the cause.

On that part of the charge which states John Innes Clark to be responsible to Carrington to the amount of the money he
[*327] had received, there is no difference of * opinion in the court.

It is, however, unnecessary to state the reasoning on which this opinion is founded, since the construction given to the letter of the 16th of March, 1801, decides the cause.

It is the opinion of the court, that there is no error, and that the judgment be affirmed.

Dickey v. The Baltimore Insurance Company.

7 C. 327.

A policy of insurance on a vessel, "at and from," an island, protects her in sailing from port to port of the island to take in a cargo.

Error to the circuit court of the United States for the district of Maryland. The case is stated in the opinion of the court.

Harper, for the plaintiff in error.

[*328] * *Pinkney*, attorney-general, contrà.

Marshall, C. J., delivered the opinion of the court, as follows: —

This action was brought on a policy, insuring The Fabius at and from New York to Barbadoes, and at and from thence to the island of Trinidad, and at and from Trinidad back to New York. The Fabius arrived at the port of Spain, in the island of Trinidad, on the 21st of October, in the year 1806, where she remained until the 5th of December, when she sailed, under a special license from the proper authorities, for Fort Hyslop, another port in the
[*329] island, for the purpose of procuring * and taking in a part of her return cargo, and with a view of returning to the port of Spain, that being the only port in the island of Trinidad, at

which vessels arriving from other places were permitted to enter, or from which those destined on foreign voyages were permitted to clear. While on her voyage to Fort Hyslop, The Fabius was lost by the danger of the seas; and the question is, whether this loss is within the policy?

Were this a case of the first impression; were it to be decided for the first time on the intention of the parties, to be collected solely from the words of the contract, some contrariety of opinion might undoubtedly be looked for, and it is uncertain what might be the opinion of the court.

Strictly speaking, a vessel is not at an island while sailing from one port to another of the same island; yet it is difficult to resist the persuasion, that something more is meant by an insurance at and from an island, than by an insurance at and from a port. The words, at and from an island, and at and from a port, are not synonymous, and yet in effect the same meaning would often be given to them, if the privilege of sailing from one port to another, for the purpose of completing the cargo, should not be granted by the policy. An insurance to an island may terminate at the first port, and the expression may be adopted from the uncertainty at what port the vessel insured may first arrive; but it seems difficult to put any other construction on an insurance at and from an island, or to assign any other motive for the risk being so described, than that it is a license to use the different ports of the island, for the purpose of obtaining the return cargo. This particular policy furnishes strong reason for this construction. It is difficult to read it without feeling a conviction that the intention of the contract was to insure the whole voyage from and to New York, and to have the liberty of the islands of Barbadoes and Trinidad. There being but one port in the island of Trinidad, at which a vessel was permitted to enter or clear, takes away every inducement for inserting in the policy the words at and from the island of Trinidad, rather than the words at and from the port of Spain, in the island of Trinidad, unless those words secure the liberty of going to other *ports, for the purpose of [*330] completing the cargo, and of returning to the port of Spain to clear out for New York.

But the words of this policy are not now to receive their first construction. In Camden *v.* Cowley, mentioned 1 Marshall, 166, a ship was insured from London to Jamaica generally, and by a subsequent policy she was insured at and from Jamaica to London.

The ship having touched and stayed for some days at one port of Jamaica, was lost in coasting the island; but before she had delivered all her outward cargo at the other ports of the island.

In an action on the homeward policy, the claim of the insured on the underwriters was resisted, not on the principle that the words at and from did not imply a permission to use all the ports of the island, not on the principle that sailing from one port to another was a deviation, but on the principle that the risk on the outward policy had not terminated, and that consequently the risk on the homeward policy had not commenced when the loss happened.

A verdict was found against the underwriters, and a new trial was refused.

In Bond *v.* Nutt, Cowp. 601, the insurance was made on a ship at and from Jamaica to London, warranted to sail before the 1st of August, 1776. The ship sailed from St. Ann's, in Jamaica, on the 26th of July, for Bluefields, also in Jamaica, in order to join a convoy there. She was detained at Bluefields by an embargo, until the 6th of August, when she sailed with the convoy, but being separated from it was captured. On this policy, a verdict was given in favor of the underwriters, under the direction of Lord Mansfield, and a motion for a new trial was resisted on two grounds.

1st. That a departure from St. Ann's was not a departure from Jamaica.

2d. That going to Bluefields was a deviation, that being out of the course of the voyage from St. Ann's to London.

[*331] * After great consideration, the court was unanimously of opinion in favor of the motion.

Lord Mansfield, in giving his opinion, said, "as neither party knew from what part of the island the ship would sail, they used the words at and from Jamaica, which protected her in going from port to port, till she sailed." He also said, "had the insurance been at and from St. Ann's, the going round the island to Bluefields, would have been a deviation."

In Thelusson *v.* Furguson, Doug. 346, an insurance was made "at and from Gaudaloupe to Havre, warranted to sail on or before the 31st December." The vessel took in her cargo at Point Petre in Gaudaloupe, and for the purpose of obtaining convoy, sailed on the 24th of October, to Basseterre, where there is no port, but only an open road. She was there detained till the 10th of January, when she sailed with convoy, but was captured on the return voyage.

The plaintiffs obtained a verdict. A motion was made for a new trial, which was refused. Lord Mansfield said, "under an insurance" at and from such a place as Gaudaloupe or Jamaica, the word "at" comprises the whole island, and under that word, the ship is protected in going from port to port, round the coast of the island.

The underwriters not being satisfied with this decision, another

action was afterwards brought on the same policy against Staples, also an underwriter. But upon that action, the only point insisted on, was that the vessel had not sailed by the stipulated day.

It appears, then, to be the settled doctrine of the courts of England, that an insurance "at and from an island" such as those in the West Indies generally, insures the vessel while coasting from port to port of the island, for the purpose of the voyage insured. It is dangerous to change a settled construction on policies of insurance.

It is the opinion of this court, that the circuit court erred in not giving the instruction prayed for by the *counsel for [*332] the plaintiff, and that the judgment be reversed, and the case remanded to that court with directions, to give the instructions prayed for by the plaintiffs, as stated in the bill of exceptions filed in the cause.

THE MARINE INSURANCE COMPANY OF ALEXANDRIA v. HODGSON.

7 C. 332.

Any fact, which clearly proves it to be against conscience to execute a judgment at law, of which the complainant could not have availed himself in a court of law, or which he was prevented from availing himself of, by fraud, or accident, unmixed with any fault or negligence of himself, or his agent, will induce a court of equity to enjoin the judgment.

But a legal defence, actually made at law, is not ground for a bill, though the court may be of opinion it ought to have prevailed.

APPEAL from a decree of the circuit court for the District of Columbia. The case is stated in the opinion of the court.

E. J. Lee, and *C. Lee*, for the appellants.

Swann, and *Jones*, for the appellees.

*MARSHALL, C. J., delivered the opinion of the court, as [*335] follows:—

This suit was brought in the circuit court sitting in chancery, for the purpose of obtaining a perpetual injunction to a judgment rendered against the plaintiffs in favor of the defendant, on a policy of insurance effected by him as agent for G. F. Straas and others, of *Richmond, on the brig called The Hope. The [*336] allegations of the bill are entirely unsupported by testi-

mony, except those which relate to the value of the vessel insured. The Hope was valued in the policy at $10,000, and $8,000 were insured upon her. She is stated to have been in fact worth less than $4,000.

The underwriters contend that they were in the practice of refusing to insure on any vessel more than four fifths of her value, and that they were led to make this insurance by a misrepresentation respecting the value of The Hope. They therefore pray to be relieved from so much of the verdict and judgment rendered thereon as exceeds that value.

On the part of the defendants it is contended that the plaintiffs have not made out a case which entitles them to the aid of a court of equity.

Without attempting to draw any precise line to which courts of equity will advance, and which they cannot pass, in restraining parties from availing themselves of judgments obtained at law, it may safely be said that any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not have availed himself in a court of law; or of which he might have availed himself at law, but was prevented by fraud or accident unmixed with any fault or negligence in himself or his agents, will justify an application to a court of chancery.

On the other hand, it may with equal safety be laid down as a general rule that a defence cannot be set up in equity which has been fully and fairly tried at law, although it may be the opinion of that court that the defence ought to have been sustained at law.

In the case under consideration the plaintiffs ask the aid of this court to relieve them from a judgment, on account of a defence which, if good anywhere, was good at law, and which they were not prevented, by the act of the defendants, or by any pure and unmixed accident, from making at law.

It will not be said that a court of chancery cannot in-
[*337] terpose in any such case. Being capable of imposing * its own terms on the party to whom it grants relief, there may be cases in which its relief ought to be extended to a person who might have defended, but has omitted to defend himself at law. Such cases, however, do not frequently occur. The equity of the applicant must be free from doubt. The judgment must be one of which it would be against conscience for the person who has obtained it to avail himself.

The court is of opinion that this is not such a case.

William Hodgson, as agent for the insured, applied for insurance on the brig Hope on a voyage from St. Domingo to her port of dis-

charge in the Chesapeake, and laid before the board the following certificate: —

"This may certify, that I was master of the schooner Sophia, of this place, and Alexander Burot, supercargo; that while we were at the city of St. Domingo, in July last, Mr. Burot purchased the brig Hope, of Boston, and I was called on, with a carpenter, to examine her, and found her to be a stout, well-built vessel, of about 250 tons, in good order, and well found with sails, rigging, &c., was built in the State of Massachusetts, and is from six to seven years old. I left the city of St. Domingo on the 27th of July, and Mr. Burot expected to sail from there about the 15th or 20th of August, up the coast, to take in mahogany. JAMES MAXWELL.

"September 24, 1799."

Upon view of this certificate the vessel was valued at $10,000, and the insurance made at $8,000. On the voyage the vessel was captured.

In fact, The Hope was of 160 tons burden, and was from eight to nine years old. There is reason to believe that she was not worth more than $3,000.

It does not appear that the loss was fraudulent, or that the cargo was insured.

The plaintiffs contend, that this misrepresentation led them to value the vessel much higher, and to insure a *much [*338] larger sum on her than they would have done had a true description been given of her size and age.

To support this allegation they state their practice never to insure on any vessel more than four fifths of her real value, and their rule, which was known to Hodgson, (he being himself one of the directors,) to require that every order for insurance should be in writing, and should contain, among other things, "as full a description of the vessel and voyage as can be given."

The answer asserts that when the certificate was laid before the board of directors, Hodgson was asked if he would vouch for its truth, which he refused to do, whereupon the board agreed to value the vessel at $10,000, and to make the insurance required. He himself believed the certificate to be accurate, and is persuaded that the insured entertained the same opinion. He does not think that the tonnage of the vessel weighed much with the parties. It is not mentioned in the policy.

Straas and Leeds, whose agent Hodgson was, and for whom the insurance was made, are not parties to the bill.

No fraud is proved on them other than what is to be inferred from the error in the certificate given by Maxwell, nor ought their conduct to be decided on, or their interests affected in a suit to which they are not parties, although they might have been made defendants.

The court will not undertake to say what influence this certificate might have had, or ought to have had, at law. But since the plaintiffs were not prevented from using it at law by the act of the defendants, or by any positive rule which disabled them from doing so, they have not made out a case of such clear equity, a case in which it would be so obviously against conscience for the defendant to enforce the judgment at law, as to justify the interposition of a court of chancery.

The judgment is to be affirmed, with costs.

8 P. 271; 8 H. 134; 17 H. 443.

[*339] *LOCKE *v.* THE UNITED STATES.

7 C. 339.

Under the Collection Act of March 2, 1799, (1 Stats. at Large, 678, s. 71,) "probable cause for the prosecution" imports, circumstances which warrant suspicion.

The shipment of goods of foreign manufacture, from Boston to Baltimore, without certificates of the payment of duties, consigned to fictitious names, the marks of the packages having been changed, taken together, constitute probable cause for a prosecution, under the 50th section of the said act.

A count on that section is good, though it charge that the time, place, and vessel of importation were unknown to the attorney.

APPEAL from the sentence of the circuit court of the United States for the district of Maryland, on a libel of information, containing eleven counts. The 4th count, upon which this court proceeded, charged that the goods, being of foreign growth and manufacture, and subject to the payment of duties imposed by the laws of
[*340] the United States, *between the 1st of May, 1804, and the day of filing the libel, were imported from some foreign port or place to the attorney unknown, into some port of the United States to the said attorney unknown, in a certain vessel to the said attorney unknown, and were afterwards and before filing the libel unladed at the said last-mentioned port from the said vessel without a permit from the proper officers of the customs of the last-mentioned port.

[*344] *MARSHALL, C. J., delivered the opinion of the court, as follows:—

This is a writ of error to a judgment of the circuit court for the district of Maryland, affirming a judgment of the district court, which condemned the cargo of The Wendell, as being forfeited to the United States.

The first point made by the plaintiff in error, is that the information filed in the cause, is totally insufficient to sustain a judgment of condemnation.

The information consists of several counts, to all of which exceptions are taken. The court, however, is of opinion that the 4th count is good, and this renders it unnecessary to decide on the others.

That count is founded on the 50th section of the Collection Law, and alleges every fact material to the offence.

It is, however, objected to this count, that the time and place of importation, and the vessel in which it was made, are not alleged in the information, but are stated to be unknown to the attorney.

*These circumstances are not essential to the offence, nor [*345] can they, from the nature of the case, be presumed to be known to the prosecuting officer.

The offence is charged in such a manner as to come fully within the law, and is alleged to have been committed after the passage of the act, and before the exhibition of the information. This allegation, in such a case, is all that can be required.

The 4th count of the information being sufficient in law, the court will proceed to examine the testimony adduced to support it.

It is proved incontestably that the goods are of foreign manufacture, and consequently have been imported into the United States.

The circumstances on which the suspicion is founded that they have been landed without a permit, are —

1st. That the whole cargo, in fact, belongs to the claimant, and yet was shipped from Boston in the names of thirteen different persons, no one of whom had any interest in it, or was consulted respecting it, and several of whom have no real existence.

2d. That no evidence exists of a legal importation into Boston, the port from which they were shipped, to Baltimore, where they were seized.

3d. That the original marks are removed, and others substituted in their place.

The counsel for the claimant has reviewed these circumstances separately, and has contended that no one of them furnishes that solid ground of suspicion which can create a presumption of guilt, and put his client on the proof of his innocence. That they are

either indifferent in themselves, mere casualties, or are reasonably accounted for.

To the employment of fictitious names as shippers, he says, that if the circumstance be not totally immaterial, it is sufficiently [*346] accounted for by the deposition of * William French, who says, "he understood that the claimant in the cause, was in embarrassed circumstances some time before the shipment of these goods, and that he has understood and believes from general report that, for the purpose of preventing his property from being attached, he was in the habit of shipping his property in the names of other persons."

The court is of opinion that the circumstance is far from being immaterial. It is certainly unusual for a merchant to cover his transactions with a veil of mystery, and to trade under fictitious names. The manner in which this mysterious conduct is accounted for, is not satisfactory. It does not appear that his creditors were in Baltimore, or would be more disposed to attach his property in that place than in Boston, and it does not appear that in Boston the names of others were borrowed to protect his property from his creditors. The fact itself, if true, might be proved by other and better testimony. This habit might have been proved by his clerks.

An attempt is made to account for the circumstance that the goods were not regularly entered at the custom-house of Boston, by the testimony of the same William French, who deposes that goods to a large amount are transported by land to Boston, and if intended for domestic consumption, are generally unaccompanied by certificates of having paid the duties. The inference is therefore considered as a fair one, that these goods may have paid the duties at some other port where they were purchased by Mr. Locke, and transported by land to Boston.

The court is not satisfied with this inference. Goods in packages, unaccompanied by certificates of having paid the duties, are always liable to be questioned on that account. Large purchasers, therefore, even where reëxportation is not intended, would choose to be furnished with this protection. It is a precaution which costs nothing, and which a prudent merchant will use. The presumption, therefore, is always against the person who is in possession of goods in the original packages without these documents. This presumption ought to be removed, and may be removed, not by proving [*347] * that cases have existed where a purchaser of goods, that have been regularly entered, has omitted to furnish himself with certificates, but that the particular case may reasonably be sup-

posed to be of that description. The actual importation, or the actual purchase of the very goods, or of goods of the same description, may be proved, and ought to be proved, by a person who has been so negligent as not to obtain certificates that would exempt them from forfeiture.

The alteration of the original marks has been treated as an immaterial circumstance, because no criminal motive can be assigned for it. This alteration, it is said, was not calculated to impress the revenue officers with the opinion that the duties had been paid, and is therefore not to be considered as made with that motive.

Certainly, the alteration was not made without a motive. Men do not usually employ so much labor for nothing. If they use mystery without an object, they must expect to excite suspicion.

To do away that suspicion they ought to show an object.

In the present case, it is not improbable that the motive was to relieve the goods from the suspicion of being imported in violation of the then existing prohibitory laws. One witness, who deposes that the goods were of British manufacture, also deposes that he never saw goods imported from Great Britain with such marks as those which were found on the goods of Mr. Locke. In the absence of other motives, the mind unavoidably suggests this.

If these circumstances were even light, taken separately, they derive considefable weight from being united in the same case. If these goods have really paid a duty, it is peculiarly unfortunate that they should have been shipped without certificates of that fact, under fictitious names, from a port where they were not entered, and that the marks of the packages should have been changed. It is peculiarly unfortunate, that these circumstances cannot be explained away by showing that the goods have been entered elsewhere, or even *that the claimant has purchased such goods [*348] from any person whatever.

These combined circumstances furnish, in the opinion of the court, just cause to suspect that the goods, wares, and merchandise, against which the information in this case was filed, have incurred the penalties of the law.

But the counsel for the claimant contends, that this is not enough to justify the court in requiring exculpatory evidence from his client. Guilt, he says, must be proved before the presumption of innocence can be removed.

The court does not so understand the act of congress. The words of the 71st section of the Collection Law, which apply to the case, are these: "And in actions, suits, or informations to be brought,

where any seizure shall be made pursuant to this act, if the property be claimed by any person, in every such case the *onus probandi* shall be upon such claimant." "But the *onus probandi* shall be on the claimant, only where probable cause is shown for such prosecution, to be judged of by the court before whom the prosecution is had."

It is contended, that probable cause means *primâ facie* evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation.

This argument has been very satisfactorily answered on the part of the United States, by the observation that this would render the provision totally inoperative. It may be added, that the term "probable cause," according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress.

The court is of opinion that there is no error, and that the judgment be affirmed with costs.

8 C. 109; 3 W. 246; 4 H. 242.

[*349] *The Schooner Good Catharine v. The United States.

7 C. 349.

A vessel of the United States, captured, condemned, sold, purchased by her former master, a citizen of the United States, who obtained a Danish burgher's brief, and who cleared out of a port of the United States as a Dane, is a foreign vessel within the 5th section of the act of 9th of January, 1808, (2 Stats. at Large, 454,) although she was really owned by a citizen of the United States.

This was an appeal from the sentence of the circuit court for the district of Maryland, which condemned the schooner Good Catharine as a foreign vessel, for a violation of the 5th section of the act of January 9th, 1808, supplementary to the Embargo Act.

She was originally an American vessel, but had been captured and condemned as prize, and purchased by Hurst, her former master, an American citizen. She took on board goods other than the provi-

sions and sea-stores necessary for the voyage, and cleared out as a Dane.

Martin, for the appellant.

Pinkney, attorney-general, for the United States.

The sentence of the circuit court was affirmed.

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* BOND, and another, *v.* JAY. [* 350]

7 C. 350.

The exception in the Maryland Statute of Limitations, in favor of "such accounts as concerns the trade or merchandise between merchant and merchant, their factors and servants, which are not residents within this province," applies to dealings between a merchant creditor residing out of Maryland, and a debtor residing in Maryland.

And in order to take the case out of the exception, it is not sufficient, to aver that the creditor returned to, came, and was within the State of Maryland after the cause of action accrued, and more than three years before bringing the suit. It is necessary to aver that the plaintiff became a resident in Maryland more than three years before the suit was brought.

ERROR to the circuit court of the United States, for the district of Maryland, in an action of *assumpsit* brought by Bond and Brooks against Jay, surviving partner of Samuel Jay and Gabriel Christie, trading under the firm of Samuel Jay and Company, upon an account for merchandise sold and delivered. The pleadings are stated in the opinion of the court.

Harper, for plaintiffs in error.

Pinkney, attorney-general, contrà.

* MARSHALL, C. J., delivered the opinion of the court, as [* 352] follows: —

This suit was brought by the plaintiff, a merchant of Pennsylvania, against the defendant, a merchant of Maryland, upon an account which grew out of their trade with each other as merchants. The defendant pleaded the Statute of Limitations, to which the plaintiff replied that the plaintiff, who resided in the State of Pennsylvania, and the defendant, were employed in mutual trade and merchandise, of, and concerning which the said several sums of money in the said declaration mentioned grew due. The defendant rejoins that the plaintiff came within the State of Maryland in 1797, and that the original writ in this cause issued on the 5th of July, 1808, and not

before. The plaintiff demurred, and upon argument the demurrer was overruled, and the bar adjudged to be good.

A writ of error has been sued out to the judgment of the circuit court, and the questions in the case are,

1. Is the replication good in itself?
2. Does the rejoinder avoid the replication and sustain the plea: —

These questions depend on the Act of Limitations, passed [*353] in 1715, by the legislature of Maryland. The *material part of that act is in these words: "Be it enacted, that all actions, &c., other than such accounts as concerns the trade of merchandise between merchant and merchant, their factors and servants, which are not residents within this province," &c., "shall be commenced or sued within three years ensuing the cause of such action, and not after."

By the plaintiffs it is contended, that if either party reside without the province, the case is within the exception: by the defendant, that to bring the case within the exception both parties must reside without the province.

It is so unusual for a legislature to employ itself in framing rules which are to operate only on contracts made without their jurisdiction, between persons residing without their jurisdiction, that courts can never be justified in putting such a construction on their words if they admit of any other interpretation which is rational and not too much strained.

This, it is thought, may be done in the case now to be decided. The words "which are not residents," refer, it is said, to both parties, plaintiff and defendant. They comprehend all the persons previously enumerated. Let this be conceded.

Then read the exception as if the word "both" or "all" were inserted. It will stand thus: "other than such accounts as concerns the trade or merchandise between merchant and merchant, their factors and servants, which are not both or all residents within this province." The plain meaning of the sentence, so read, would be that accounts between merchant and merchant either of whom resided out of the province, would come within the exception. It is admitted that without the word "both" or "all," the more obvious meaning of the sentence is that for which the defendant contends. Yet it will bear the same construction without, as with either of those words, and the subject-matter of the law so clearly requires this interpretation that the court thinks it may be made.

[*354] The rejoinder is founded on the third section of the *act which contains the usual exceptions in favor of infants, &c., and allows three years after the removal of the impediment to bring their suit.

It is contended that since the Act of Limitations runs against a person beyond sea, from the time of his coming into the country, so from analogy it ought to run against a non-resident merchant from the time of his coming, though for a mere temporary purpose, within the country.

The court cannot assent to the correctness of this reasoning. To render it applicable, the rejoinder ought to have averred that the plaintiff had become a resident of the State of Maryland more than three years before the institution of the suit. Not having done so, the words of the exception have never ceased to be applicable to the plaintiff; and, consequently, the statute has never commenced to run.

It is the opinion of this court that the circuit court erred in overruling the demurrer of the plaintiff to the rejoinder of the defendant in this cause, and that the judgment be reversed and annulled, and the cause remanded, with instructions to render judgment on the said demurrer in favor of the plaintiff, and that further proceedings may be had therein according to law.

Judgment reversed.

Preston v. Tremble.

7 C. 354.

If an equitable title be merged in a grant, the party has no relief in equity.

Appeal from a decree of the circuit court of the United States, for the district of East Tennessee, dismissing the plaintiff's bill upon demurrer, for want of equity.

The bill stated that Preston, the complainant, had title to a tract of land in the State of Tennessee, but the defendant, Tremble, fraudulently and deceitfully entered into it, and holds him out.

[* 355] * In setting forth the title it is stated, that the land formerly lay within the State of North Carolina, during which time, one Ephraim Dunlop made an entry for the land in regular form, paid the purchase-money to the State, and performed every other requisite to complete the contract; but before a patent was obtained, the legislature of North Carolina passed a law, defining the limits of the Indian boundary, declaring all entries and surveys already made within those limits, to be null and void, and directing the entry-takers to refund all moneys received therefor. That Dunlop never received back the purchase-money, nor consented to annul the contract. That the law of North Carolina, rescinding the contract, was void. That Dunlop afterwards obtained a warrant to survey the land, and ob-

tained a patent therefor, from the State of North Carolina, and afterwards conveyed the land to John Rhea, who conveyed to Preston, the plaintiff.

P. B. Key, for plaintiff in error.

[*356] *MARSHALL, C. J. If your title is good at law, you have no case in equity. If you have any title it is at law. If you have no title at law, you can have none in equity. The equitable estate is merged in the grant.

This is an attempt to substitute a bill in equity for an action of trespass.

Decree affirmed.

Brig PENOBSCOT *v.* THE UNITED STATES.

7 C. 356.

Under the non-intercourse laws in force, March 15, 1811, a vessel could not lawfully sail from a foreign port with a cargo, bound for a port of the United States, and come into the waters of the United States, for the purpose of making inquiry if she might land her cargo.

APPEAL from a sentence of the circuit court of the United States for the district of Georgia, condemning the brig for violation of the acts of March 1, 1809, (2 Stats. at Large, 528,) May 1, 1810, (2 Stats. at Large, 605,) and March 2, 1811, (2 Stats. at Large, 651,) and the President's proclamation of November 2, 1810. The defence was, that the vessel sailed from Castine, in the State of Maine, where she was owned, for Antigua, in December 1810, put into Turks Island, in distress, in February, 1811, took a cargo of salt there, and sailed for Savannah, intending to stand off and on to get information whether she could enter: that she arrived off Savannah March 15th, 1811, and that when approaching the port, a gale of wind forced her to seek for a harbor, for which she was making when seized by the revenue cutter.

P. B. Key, for the appellants.

J. R. Ingersoll, for the United States.

[*358] *MARSHALL, C. J., stated the opinion of the court to be,

that the vessel came at her peril; that she was bound to get information; but was negligent in not calling at Amelia Island, and in not inquiring of the vessel which she spoke off the port of Savannah.

Sentence affirmed.

Çaze and Richaud *v.* The Baltimore Insurance Company.

7 C. 358.

Underwriters upon cargo are not liable to the owner for freight, in case of abandonment. Freight, *pro rata itineris*, is due only when there is a voluntary acceptance of the goods at an intermediate port.

Error to the circuit court of the United States for the district of Maryland, in an action of *indebitatus assumpsit* for freight. The case is stated in the opinion of the court.

Harper, for the plaintiffs.

Pinkney, attorney-general, for the defendants.

* Story, J., delivered the opinion of the court, as fol- [*361] lows.

* The present action is brought to recover freight *pro* [*362] *rata itineris*, under the following circumstances: —

The plaintiffs were the owners of the ship Hamilton and cargo, and effected insurance of her cargo on a voyage from Bordeaux to New York. The sum of $11,000 was underwritten by the defendants — the sum of $10,000 at Philadelphia, and the residue of the value of the cargo ($1,986,) was left uninsured. During the voyage the ship and cargo were captured, carried into Halifax, and there condemned. The plaintiffs abandoned to the underwriters, and received payment for a total loss. An appeal from the sentence of condemnation was interposed and the sentence finally reversed, and the proceeds of the cargo, which had been previously sold by order of court, were paid over to the underwriters in proportion to the sums underwritten by them respectively.

We are all of opinion that the plaintiffs are not entitled to recover in the present action.

In the first place, the court are satisfied that, as between the insured and the underwriter on the cargo of a ship, the latter is in no case responsible for the payment of freight, whether there be an abandonment or not. It is a charge on the cargo against which he does not undertake to indemnify the owner; and if authority be necessary to support the position, it is fully borne out by the doctrine of Lord Mansfield in Baillie *v.* Modigliani, Marshall, 728.

In the next place, we are all of opinion that no freight whatsoever was, under the circumstances of this case, due. Freight, in general, is not due unless the voyage be performed. Here, the ship and cargo never arrived at their port of destination, and of course the whole freight could not be due. Was a *pro rata* freight due? We think not. The whole class of cases resting on the authority of Luke *v.* Lyde, 2 Burr. 882, proceed on the ground that there is a voluntary acceptance of the goods themselves at an intermediate port; and not, as in the present case, a compulsive receipt from the hands of the admiralty after capture and condemnation, and ultimate restoration upon the appeal. There is, in our judgment, no [* 363] equity to support such a claim; and although *it receive countenance from some remarks incidentally thrown out in Baillie *v.* Modigliani, the current of more recent authority, as well as of principle, clearly points the other way.

It may be further added that, as between the insured and the underwriter, the existence of a lien on the cargo for freight does not vary the legal responsibility of the underwriter on such cargo after an abandonment.

The judgment of the circuit court is affirmed, with costs.

8 C. 39; 12 W. 383.

The Schooner Jane *v.* The United States.

7 C. 363.

In a prosecution against a vessel for violation of a law of the United States, it is not necessary to adduce positive testimony of the identity of the vessel. It is sufficient if the circumstances fully satisfy the judicial mind, of the fact charged.

Appeal from a sentence of the circuit court of the United States for the district of Maryland, which condemned the schooner Jane for violation of the Non-intercourse Act, (2 Stats. at Large, 528.)

Nicholson and *Harper*, for the appellant.

Pinkney, attorney-general, for the United States.

*WASHINGTON, J., delivered the opinion of the court, as [*364] follows:—

This was an information filed in the district court of the United States, for the district of Maryland, against the schooner Jane, and her cargo, for a breach of the law interdicting the commercial intercourse between the United States and Great Britain and France, and their dependencies. The particular charge alleged in the information is, that this vessel had imported into the port of Baltimore, from some place in the island of St. Domingo, a dependence of France, 1920 bags of coffee, in violation of the above law. To establish this charge two witnesses were examined on the part of the United States, who concurred in testifying that they were at Port au Prince, in the island of St. Domingo, from about the middle of August to the middle of September, in the year 1809, and that they saw lying there a schooner called The Jane, of Baltimore, Vezey, master. That her cargo consisted of flour, which she discharged at that place, and took in a quantity of coffee, in bags, and that she sailed from Port au Prince about the 10th of September.

One of these witnesses thinks that the name "Jane" was painted on the stern of the vessel, but is not positive as to that fact; nor can either of the witnesses say that the vessel they saw at Port au Prince was the same which was seized by the collector of the port of Baltimore.

The seizure of the vessel and cargo, which are the subject of this controversy, was made between the 1st and 18th of October, 1809.

Upon the above evidence, the district court dismissed the information, and ordered restitution of vessel and cargo. This writ of error is taken to the sentence *pronounced by the circuit [*365] court, which, upon an appeal, reversed that of the district court, and condemned both the vessel and cargo. For the claimants it is contended, that the evidence in this case is merely presumptive, and is much too light to establish the fact, necessary to be made out, that the vessel seized by the collector of Baltimore is the same vessel which was seen by the witnesses at Port au Prince. If the latter part of the objection to the evidence be well founded it is fatal to the sentence, because although presumptive evidence is clearly admissible, and may of itself be sufficient to support, in many instances, even a criminal prosecution, yet the circumstances proved ought not only to harmonize with each other, but they ought in themselves to

be so strong as fully to satisfy the mind of the fact they are intended to establish.

In this case there is such a coincidence in the circumstances proved in relation to the vessel, the cargo, and the voyage, as to impress the mind with a conviction, almost irresistible, that the schooner Jane, seen by the witnesses at Port au Prince, is the identical vessel against which this prosecution is carried on. That vessel was a schooner, the reputed name of which, at Port au Prince, was The Jane, of Baltimore, Vezey, master; which took in, at that port, coffee in bags, and sailed from thence about the 10th of September. The vessel in question is a schooner, bears the same name, was commanded by a captain Vezey, her cargo coffee in bags, and she arrived at Baltimore between the 1st and 10th of October, about the time when a vessel which had left Port au Prince on the 10th September might reasonably have been expected to arrive. It is barely possible that the facts proved in this case should apply to any other vessel than the one in question; and in the absence of all explanatory evidence, which it was so entirely in the power of the claimants to have produced, is sufficient to deprive him of this slight ground to stand upon.

It is true that the proof of identity might have been strengthened by evidence that this vessel sailed from Baltimore, of the time when she sailed, the port for which she cleared, and the cargo she took out with her. But it does not appear in this record, nor [*366] *does it necessarily follow, that she sailed from Baltimore on her outward voyage, or that it was in the power of the United States to prove any of the above facts. On the other hand, nothing could have been more easy than for the claimants to have proved them, and still further to have proved, if their case would have admitted it, that the evidence on the part of the United States did not apply to this vessel.

The court is of opinion that there is no error in the sentence pronounced by the circuit court, and that the same should be affirmed, with costs.

Lee v. Munroe & Thornton.

7 C. 366.

The United States are not bound by the declarations of their agent, founded upon a mistake of fact, unless it clearly appear that the agent was acting within the scope of his authority, and was empowered in his capacity of agent to make such declaration.

THIS was an appeal from the decree of the circuit court for the District of Columbia, in a suit in chancery, brought by Lee against Thomas Munroe, superintendent of the city of Washington, and William Thornton, the survivor of the late board of commissioners for that city. The object of the bill was to obtain a discount of $3,000 upon a judgment, which Munroe, as superintendent, had obtained against Lee upon his bond. The ground upon which this set-off was claimed, was this. Morris and Nicholson were indebted to Lee in that sum by promissory notes, and offered payment in certain city lots, the title whereof was in the commissioners of the city. Morris and Nicholson having paid money in advance to the commissioners, were, as they supposed, entitled to demand from them the conveyance of the lots in question, under existing contracts between the commissioners and themselves. Whereupon Lee applied to the commissioners to know of them whether they would convey the lots to him, upon the order of Morris and Nicholson. This they promised to do, and made an entry of it in their journal. Lee then agreed with Morris and Nicholson to receive the lots in payment, and upon receiving their order to the commissioners to convey them to him, gave up to Morris and Nicholson their notes for $3,000, which were the *evidence of the debt. On presenting this [*367] order to the commissioners, they refused to convey the lots, unless he would pay them the purchase-money due thereon to them from Morris and Nicholson, alleging that the balance was against Morris and Nicholson, in their account with the commissioners. Morris and Nicholson shortly afterwards became insolvent.

C. Lee, for the appellant.

Jones, contrà.

LIVINGSTON, J., delivered the opinion of the court, as follows:—

*This is a bill seeking relief against public officers nomi- [*368] nally, but against the United States, in fact, for a mistake of the former in a representation made by them to the appellant, by which it is alleged, that he has sustained a loss, for the redress of which in damages this suit is brought. It has been contended in this case, that the defendants having, in their public character as commissioners of the city of Washington, misinformed the plaintiff as to the state of the accounts between them and Morris and Nicholson, and thereby induced him to relinquish a demand which he had against the latter, he is now entitled to have discounted from a judgment, which they have obtained against him for the use of the

United States, a sum equal to the principal and interest of the debt which he lost by the confidence which he placed in them; and this is supposed to be like the case of a party, who being about to lend money on real estate, applies to one who holds a prior mortgage, to ascertain whether he has any incumbrance on it. There is no doubt, in such a case, that if the person making the application discloses that he is about lending money on the estate, he will be preferred to the first mortgagee, should the latter deny his having a mortgage, or assert that it is satisfied; and it seems agreeable to the dictates of reason and good conscience, that his claim should be postponed to that of a person whose confidence was inspired by the misrepresentation of one who was acting for himself, and every way competent to inform him of the truth. But in all the cases which have been decided on this principle, the fraud, for such it is supposed to be, has been practised by a party who has himself an interest in the subject-matter of inquiry, who cannot well be mistaken, and whose conduct therefore ought to be conclusive on him, when the rights of third persons come in question. It is, however, not known to the court, that the same rule of decision has been extended so as to affect the interests of principals, and particularly of the public, in consequence of similar mistakes made by an agent, nor is it reasonable that such extension should take place, unless it most manifestly appear that the agent was acting within the scope of his authority, and was empowered, in his capacity of agent, to make the declaration or representation which is relied on as the ground of relief. In the present case, the defendants were employed and authorized by the [*369] public to *sell and make contracts for the sale of certain lands lying within this district. In pursuance of these powers, they had made contracts with Morris and Nicholson, who, having advanced a considerable sum of money, were in the habit of directing the defendants, from time to time, to convey certain of the lots which they had contracted for, to the persons named in such orders. The commissioners, supposing that Morris and Nicholson had not yet received titles to land equal in value to the sum which they had advanced, told the plaintiff that, if he would obtain an order from them for certain lots, they should be conveyed to him. But in a day or two after, they discover that Morris and Nicholson had already received deeds for lots to the whole amount of the sum which they had advanced, and give notice of this fact to the plaintiff, offering, however, to convey to him the lots in question, on his paying for them at the rate expressed in their contract with Morris and Nicholson. The court will not inquire whether the plaintiff really suffered any injury from the confidence which he placed in the commissioners,

or whether he lost his remedy against Morris and Nicholson, (of which very serious doubts may well be entertained,) but a majority of the judges are of opinion, that the communication made by the commissioners to the plaintiff was altogether gratuitous, and that, not being within the sphere of their official duties, the United States cannot be injured by it, and that the defendants could not, without rendering themselves personally liable to the public, have made a title to the plaintiff after a discovery of the mistake which they had made, but on the terms proposed by them; or, in other words, that the United States could not, by any declaration of the commissioners proceeding from a mistake, lose the lien which was secured to them by the contract with Morris and Nicholson, for the stipulated price of this property. If the commissioners acted fraudulently, which is not pretended, they may be personally liable in damages to the plaintiff; but if it were a mistake, and such it is represented to be, the court has already said that the interests of the United States cannot, and ought not, to be affected by it. Were it otherwise, an officer intrusted with the sales of public lands, or empowered to make contracts for such sales, might by inadvertence, or incautiously giving information to others, destroy the lien of his principals on very *valuable and large tracts of real estate, and even pro- [*370] duce alienations of them without any consideration whatever being received. It is better that an individual should now and then suffer by such mistakes, than to introduce a rule against an abuse, of which, by improper collusions, it would be very difficult for the public to protect itself. It is the opinion of this court, that the decree of the circuit court be affirmed.

8 H. 134.

HERBERT and others *v.* WREN and Wife and others.

7 C. 370.

Courts of chancery have concurrent jurisdiction with courts of law, in cases of dower, especially where partition, discovery, or account is prayed, and in cases of sale where the plaintiff is willing that a sum in gross should be given in lieu of dower.

If a devise of land in Virginia to the widow, appear from circumstances to be intended in lieu of dower, she must make her election, and cannot take both.

If a wife join her husband in a lease for years, she is still entitled to dower in the rent.

A court of chancery cannot allow a part of the purchase-money in lieu of dower, when the estate is sold, unless by consent of all parties interested.

ERROR to the circuit court for the District of Columbia, sitting at Alexandria, in a suit in chancery brought by Richard Wren, and Susanna, his wife, who was the widow of Lewis Hipkins, deceased, and John and Westley Adams, her trustees, against W. Herbert, T. Swann, R. B. Lee, and W. B. Page, (trustees of Philip R. Fendall, deceased,) and E. I. Lee, Jos. Deane, and F. Greene.

The case was stated by MARSHALL, C. J., (in delivering the opinion of the court,) as follows: —

This suit was brought by Richard Wren, and Susanna, his wife, formerly the wife of Lewis Hipkins, praying that dower may be assigned her in a tract of land of which her former husband died seized, and which has since been sold and conveyed to the defendant, Joseph Deane, or that a just equivalent in money may be decreed her in lieu thereof.

The material circumstances of the case are these: —

Lewis Hipkins being seized as tenant in common with Philip Richard Fendall of one third of a tract of land lying in the
[*371] county of Fairfax, by his deed *executed by himself and wife, leased the same to Philip Richard Fendall, for the term of thirteen years, to commence on the 1st of September, in the year 1794, at the annual rent of 140*l.*

In the year 1794, Lewis Hipkins departed this life, having first made his last will and testament in writing, in which he devised both real and personal estate to his wife; the real estate for her life, with remainder to his three daughters.

To his two sons he devised the premises in question, and added, that if, during the minority of his sons, Philip R. Fendall should erect thereon another water-mill or water-mills, his desire was that his sons, or the survivor of them, should, at the expiration of the lease for years made to the said Philip, pay one third part of the value of such mill or mills, and in default of payment, that P. R. Fendall should be permitted to hold the same at the present rent until the value should be received.

He directed his two tracts of land in London to be sold for the payment of his debts, and appropriated the annual rent accruing on the lands leased to P. R. Fendall to the education and maintenance of his children.

The testator then adds the following clause: —

"If it should so happen that the remaining part of my estate not herein bequeathed, should prove insufficient to pay all just demands against my estate, then my will and desire is, that my executors shall sell as much of my real and personal estate as may be necessary to

make up the deficiency, and that they shall sell such parts as will divide the loss among my representatives as nearly as may be in proportion to the property bequeathed to them and each of them."

On the 13th day of December, in the year 1797, Susanna Hipkins, then the widow of Lewis Hipkins, conveyed her dower in the premises in question, and also in the land devised to her for life by her deceased husband, to the plaintiffs, John Adams and Westley Adams, in trust for her use.

*In the year 1803, P. R. Fendall and Walker Muse instituted a suit against the executors and children of Lewis Hipkins, deceased, and in the month of June in that year, the cause came on to be heard by consent of parties, when the court decreed that the whole estate of Lewis Hipkins be sold, and the money brought into court. [*372]

The report of the sale does not appear on the record, but an entry was made that the report was made and confirmed by the court.

Under this decree, the premises were sold and conveyed to the defendant, E. J. Lee, who purchased in trust for P. R. Fendall, one of the executors of Lewis Hipkins. On the deed of conveyance is a memorandum, stating that the property was sold subject to dower.

Lee conveyed the premises to the other defendants, trustees of P. R. Fendall, for the purposes of a trust deed which had been previously executed, conveying to them the other two thirds of the same estate on certain trusts in the deed recited.

The trustees sold and conveyed to the defendant, Joseph Deane.

The bill states that the defendant, Joseph Deane, had not paid the purchase-money, and was willing, should the court decree dower in the premises, to give an equivalent in money in lieu thereof.

Soon after the trust deed from Susanna Hipkins to John and Westley Adams, she intermarried with the plaintiff, Richard Wren.

Philip R. Fendall continued to pay the plaintiff, Susanna, during her widowhood, and the plaintiffs, Richard and Susanna, after their intermarriage, one third part of the rent accruing on the premises devised to him by Hipkins and wife until the year 1803; since which he has refused or neglected to pay the same.

The defendants, the trustees of Philip Richard Fendall, he having departed this life previous to the institution of this suit, insist—

*1. That the remedy of the plaintiffs, if they have any, is at law, and that a court of equity can take no jurisdiction of the cause. [*373]

2. That the provision made by the will of Lewis Hipkins for the

plaintiff, Susanna, not having been renounced by her, bars her right of dower in his estate.

The defendant, Joseph Deane, has put in no answer, and as against him the bill is taken as confessed.

The circuit court determined that the claim of the plaintiff, Susanna, to dower, was not barred, and decreed her a sum in gross as an equivalent therefor.

From this decree the trustees of Philip Richard Fendall have appealed. The plaintiffs also object to so much of the decree as refuses them rent on the premises, and have therefore taken out likewise a writ of error.

E. J. Lee and *C. Lee*, for the appellants.

R. I. Taylor, for the respondents.

[* 376] * MARSHALL, C. J., after stating the case, delivered the opinion of the court, as follows: —

The material questions in the cause are:

1. Has a court of equity jurisdiction in the case?

2. Is the plaintiff, Susanna, entitled to dower?

3. If these points be in her favor, what decree ought the court to make?

According to the practice which prevails generally in England, courts of equity and courts of law exercise a concurrent jurisdiction in assigning dower. Many reasons exist in England in favor of this jurisdiction; one of which is, that partitions are made and accounts are taken in chancery in a manner highly favorable to the great purposes of justice. In this case, dower is to be assigned in an undivided third part of an estate, so that it is a case of partition of the original estate as well as of assignment of dower in the part of which Lewis Hipkins died seized.

[* 377] * An additional reason and a conclusive one in favor of the jurisdiction of a court of equity is this: The lands are in possession of a purchaser who has not yet paid the purchase-money. A court of law could adjudge to the plaintiffs only a third part of the land itself. Now, if the plaintiffs be willing to leave the purchaser undisturbed, to affirm the sales and to receive a compensation for her dower instead of the land itself, a court of equity ought never, by refusing its aid, to drive her into a court of law, and compel her to receive her dower in the lands themselves. This is therefore a proper case for application to a court of chancery.

2. It is perfectly clear that the provision made by Lewis Hipkins

in his last will is no bar to a claim of dower, for several reasons, of which it will be necessary to mention only two.

1. It is not expressed to be made in lieu of dower.

2. It is not averred that she has accepted the provision and still enjoys it.

It remains to inquire what decree the court ought to make in the case.

The first question to be discussed is this: Is the plaintiff Susanna entitled both to dower and to the provision made for her in the will of her late husband?

The law of Virginia has been construed to authorize an averment that the provision in the will is made in lieu of dower, and to support that averment by matter *dehors* the will. But, with the exception of this allowance to prove the intention of the testator by other testimony than may be collected from the will itself, the act of the Virginia legislature is not understood in any respect to vary the previously existing common law.

In the English books, there are to be found many decisions in which the widow has been put to her election either to take her dower and relinquish the provision made for her in the will, or to take that provision and relinquish her dower. There are other cases in which *she has been permitted to hold both. [*378] The principle upon which these cases go appears to be this:—

It is a maxim in a court of equity not to permit the same person to hold under and against a will. If therefore it be manifest, from the face of the will, that the testator did not intend the provision it contains for his widow to be in addition to her dower, but to be in lieu of it; if his intention, discovered in other parts of the will, must be defeated by the allotment of dower to the widow, she must renounce either her dower or the benefits she claims under the will. But if the two provisions may stand well together, if it may fairly be presumed that the testator intended the devise or bequest to his wife as additional to her dower, then she may hold both.

The cases of Arnold *v.* Kempstead and wife, of Villareal and Lord Galway, and of Jones *v.* Collier and others, reported by Ambler, are all cases in which, upon the principle that has been stated, the widow was put to her election.

In the case under consideration neither party derives any aid from extrinsic circumstances, and therefore the case must depend on the will itself.

The value of the provision made for the wife, compared with the whole estate, is not in proof; but so far as a judgment on this point can be formed on the evidence furnished by the will itself, it was supposed by him to be as ample as his circumstances would justify.

The only fund provided for the maintenance and education of his five children is the rent of 140*l.* per annum, payable by P. R. Fendall. Since he has made a distinct provision for his wife, the presumption is much against his intending that this fund should be diminished by being charged with her dower.

That part of the will, too, which authorizes P. R. Fendall, in the event of building a mill, and not receiving from the sons of the testator their half of its value, to hold the premises until the rent should discharge that debt, indicates an intention that in such case the whole rent should be retained.

[*379] *The clause, too, directing the residue of his estate to be sold for the payment of debts, is indicative of an expectation that the property stood discharged of dower, and is a complete disposition of his whole estate. The testator appears to have considered himself as at liberty to arrange his property without any regard to the incumbrance of dower.

Upon this view of the will it is the opinion of the majority of the court that the testator did not intend the provision made for his wife as additional to her dower, and that she cannot be permitted to hold both.

She has not, however, lost the right of election. No evidence is before the court that she has accepted the provision of the will, nor that she still enjoys it. Indeed, there is much reason to suppose the fact to be otherwise. The decree of 1803 does not except the lands decreed to her for life from its operation, nor is the court informed by the evidence that those lands were not sold under it.

But if she had accepted that provision and still enjoyed it, there is no evidence that she considered herself as holding it in lieu of dower. On the contrary, she was in the actual perception of one third of the rent accruing on the lease held by P. R. Fendall; and in the deed executed by her in 1797, before her second marriage, she conveys her dower in the lands leased to Fendall, and also her dower in the lands devised to her by her deceased husband. It is therefore apparent that she never intended to abandon her claim to dower.

The next inquiry to be made by the court is, to what profits is the plaintiff, Susanna, entitled in consequence of the detention of dower?

It is unnecessary to decide whether, in general, a person claiming dower from a purchaser can recover profits which accrued previous to the institution of her suit. In this case the plaintiff was in the actual enjoyment of dower. She received one third of the rent accruing from the premises for nine years. She was therefore in full possession of her dower estate; and when afterwards the

[*380] land was sold under a decree of a *court, P. R. Fendall

was one of the executors who made the sale, and was himself, in effect, the purchaser of the estate. Upon no principle could he justify the refusal to pay that portion of the rent which was equal to her dower in the land, unless on the principle that she was not entitled to dower. In this case, therefore, the plaintiff is entitled to one third of 140*l.* per annum, for the remaining four years of the lease under which P. R. Fendall held the land, and to an account for profits after the expiration of the lease.

But the plaintiff, Susanna, cannot claim the profits on her dower and hold any portion of the particular estate devised to her, or of the profits on that estate. An account therefore must be taken, if required by the defendants, showing what she has received under the will of her husband. This must be opposed to the profits to which she is entitled for dower, and the balance placed to the credit of the party in whose favor it may be.

It remains to inquire whether the allowance of a sum in gross in lieu of dower in the land itself, or of the interest on one third of the purchase-money, might legally be made.

This must be considered as a compromise between the plaintiffs and the defendant, Deane. His assent being averred in the bill, and the bill being taken *pro confesso* as to him, this may be considered as an arrangement to which he has consented. This, however, cannot affect the other defendants. They have a right to insist that, instead of a sum in gross, one third of the purchase-money shall be set apart, and the interest thereof paid annually to the tenant in dower during her life.

If the parties all concur in preferring a sum in gross to the decree which the court has a right to make, still, it is uncertain on what principle seven years were taken as the value of the life of the tenant in dower. It is probably a reasonable estimate, but this court does not perceive on what principles it was made, nor does the record furnish the means of judging of its reasonableness.

This court is of opinion that there is error in the decree of the circuit court in not requiring the plaintiff, * Susanna, [*381] to elect between dower and the estate devised to her by her late husband, and in not allowing profits on her dower estate if she shall elect to take dower. The decree is to be reversed and the cause remanded for further proceedings, in conformity with the following decree: —

This court is of opinion that the plaintiff, Susanna, is not barred of her right of dower in the lands of which her late husband, Lewis Hipkins, died seized, but that she cannot hold both her dower and the property to which she may be entitled under the will of the said

Lewis. She ought, therefore, to have made her election either to adhere to her legal rights and renounce those under the will, or to adhere to the will and renounce her legal rights, before a decree could be made in her favor.

This court is further of opinion that the plaintiff, Susanna, having been in possession of her dower by the receipt of rent for several years after the death of her late husband, is, in the event of her electing to adhere to her claim of dower, entitled to receive from the estate of P. R. Fendall the profits which have accrued on her dower estate in his possession, from the time when he ceased to pay the same, until the sale was made to the defendant, Joseph Deane, and is entitled to receive from the said Joseph Deane the profits which have accrued thereon since the same was sold and conveyed to him, to ascertain which an account ought to be directed. And the court is further of opinion that an account ought also to be directed to ascertain how much the said Susanna has received from the estate of her late husband, and what profits she has received from the estate devised to her in his will; all which must be deducted from her claim for dower.

The court is further of opinion that if the parties, or either of them, shall be dissatisfied with the allotment of a sum in gross, and shall prefer to have one third part of the purchase-money, given by the said Joseph Deane for the lands in which the plaintiff, Susanna, claims dower, set apart and secured to her for her life, so that she may receive during life the interest accruing thereon,
[*382] *and shall apply to the circuit court to reform its decree in this respect, the same ought to be done.

It is the opinion of this court, that there is no error in the decree of the circuit court for the county of Alexandria in determining that the plaintiff, Susanna, was entitled to dower in the estate of her late husband, Lewis Hipkins, deceased, but that there is error in not requiring her to elect between her dower and the provision made for her in the will of her late husband, and in not decreeing profits on the same. This court doth, therefore, reverse and annul the said decree; and doth remand the cause to the said circuit court with instructions to reform the said decree according to the directions herein contained.

Johnson, J., dissented from the opinion of the court, but did not state his reasons.

THE CARGO of the Brig AURORA, BURNSIDE, Claimant, v. THE UNITED STATES.

7 C. 382.

Congress may make the revival of a law conditional upon a fact then contingent, and empower the President to declare, by his proclamation, that such fact has occurred, and the law is revived.

If one act inflict a forfeiture, and a subsequent act provides that it shall not be inflicted if the property belonged to a citizen, it is not necessary to aver in the libel that the ownership was not in a citizen; it is matter of defence.

APPEAL from a sentence of the district court for the territory of Orleans, condemning the cargo of the brig Aurora, for violating the Non-intercourse Act of March 1, 1809, (2 Stats. at Large, 528,) revived by the act of May 1, 1810, (2 Stats. at Large, 605,) and the President's proclamation of November 2, 1810. The brig sailed from Liverpool December 16, 1810, and arrived at New Orleans before February 20, 1811. The other material facts appear in the opinion of the court.

J. R. Ingersoll, for the appellant.

John Law, for the United States.

*JOHNSON, J., delivered the opinion of the court, as fol- [*387] lows:—

This is an appeal from a decision of the district court of Orleans, on a libel preferred against the goods in question, under the Non-intercourse Acts of March 1st, 1809, and May 1st, 1810.

These goods were claimed by Robert Burnside, a citizen of Orleans, as his property, and the material questions in the cause are,

1st. Is the property American, in which case it is exempted from forfeiture, by a subsequent law, namely, of March 2, 1811.[1]

*2d. Was the act of 1st March, 1809, revived by the [*388] President's proclamation at all, and if revived, did it commence its operation on the 2d February, or on the 20th May following, the time of issuing that proclamation.

On the question of fact, the court are of opinion that the evidence is not sufficient to prove the property American. The national

[1] 2 Stats. at Large, 651.

character of the property the claimant might easily have established by his correspondence, and the examination of witnesses in Europe. No such evidence is resorted to. The bill of lading alone is resorted to, on which it is said to be shipped on account of a citizen of the United States, and consigned to Burnside, but the name of the owner is not inserted. Here again the defect of evidence may have been supplied by evidence who this citizen was, but no such evidence is adduced.

In the examination of the two clerks of John Rason & Co., of Liverpool, it is simply stated, that these goods were shipped by John Richardson, of Liverpool, but on whose account they do not state, nor does it appear that they were examined to that point.

Upon the whole, we are of opinion that the absence of proof which might so easily have been supplied, will authorize a conclusion that the property was not American.

On the second point, we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act of March 1st, 1809, either expressly or conditionally, as their judgment should direct. The 19th section of that act declaring that it should continue in force to a certain time, and no longer, could not restrict their power of extending its operation, without limitation upon the occurrence of any subsequent combination of events.

On the question when the operation of the 4th section of the act should commence, we are of opinion that by reviving an act, the legislature must be understood to give it, from the time of its revival, precisely that force and effect which it had at the moment [*389] when it expired. *And that a suspended operation to the 20th May, would be wholly inconsistent with the words made use of in the 4th section of the act of May, 1810, namely, "shall be revived and have full force and operation," and therefore, that its operation commenced on the 2d February, 1811.

Some objections have been made to the sufficiency of the libel, because it does not negative the fact of American property. But on that subject, we are of opinion, that in no case can it be necessary to state in a libel, any fact which constitutes the defence of the claimant, or a ground of exception of the operation of the law on which the libel is founded.

The Schooner Hoppet and Cargo *v.* The United States.

7 C. 389.

If an act inflict a forfeiture of a vessel for importation therein of certain articles, laden on board with intent to be imported into the United States, and with the knowledge of the master or owner of the vessel, this intent and knowledge are substantive parts of the offence, and must be averred in a libel of information in the admiralty.

A statement of the offence, with that substantial certainty demanded by our free institutions, must be required in every court where justice is the object, and is not rendered unnecessary by a reference to the penal statute and a general allegation that it was violated.

Produce of a foreign country once imported into the United States, and exported thence to a foreign port, can not be again brought hither under the Non-intercourse Act of March 1, 1809, (2 Stats. at Large, 528.)

The case is stated in the opinion of the court.

Harper, for the appellants.

Pinkney, attorney-general, and *Law*, for the United States.

* *February*, 27th. Marshall, C. J., delivered the opinion [* 391] of the court, as follows: —

This is an appeal from a sentence of the court for the district of Orleans, condemning the schooner Hoppet and her cargo, as forfeited to the United States for violating the non-intercourse law.

In the district court, two informations were filed by the attorney for the United States, one claiming the ship as being forfeited, and the other claiming the cargo. Objections have been made to each of these informations, which will be separately considered.

The information against the vessel charges, in substance, that while the act, entitled "An act to interdict commercial intercourse," &c., was in force, certain goods of the growth, produce, or manufacture of France, were imported into the United States, to wit: into the port of New Orleans, in the said vessel from some foreign port or place, to wit: from St. Bartholomews, contrary to, and in violation of the 4th, 5th, and 6th sections of the act. By reason of which, and by virtue of the act of congress, entitled "An act," &c., the said vessel, her tackle, apparel and furniture have become forfeited to the United States.

* The charge contained in this information, and the only [* 392] charge it contains is, an importation into the United States of certain prohibited articles while the Prohibitory Act was in force. How far does this crime affect the vessel?

This question must be answered by the law. The 6th section of the act enacts in substance, that if any article, the importation of which is prohibited, shall be put on board of any ship, &c., with intention to import the same into the United States or the territories thereof, contrary to the true intent and meaning of this act, and with the knowledge of the owner or master of such ship, &c., such ship, &c., shall be forfeited.

This is the only section of the act which imposes a forfeiture on the vessel. It will be perceived that the crime consists in the prohibited articles being laden on board a ship with intent to be imported into the United States, and with the knowledge of the owner or master of the vessel. A union of a lading with the intention to import, and with the knowledge of the owner or master, is necessary to constitute the crime. Without these essential ingredients, the particular offence, which alone incurs a forfeiture, cannot be committed.

In the information under consideration neither of these offences is charged. It is neither alleged that the prohibited goods were put on board the ship with intention to be imported into the United States, nor with the knowledge of the owner or master.

The information against the cargo, charges in substance, that certain prohibited articles, and certain other articles not stated to be prohibited, were brought into the United States, to wit: into the port of New Orleans, while the act, entitled "An act to interdict commercial intercourse," &c., was in force, from some foreign port or place, by reason of which, and by virtue of the act, the whole cargo of The Hoppet has become forfeited.

The 5th section of the act, under which this prosecution was sustained, inflicts forfeiture on the prohibited articles imported contrary to law, and also on "all other articles on board the same [* 393] ship or vessel, boat, *raft, or carriage, belonging to the owner of such prohibited articles.

The innocent articles are liable to forfeiture only where they belong to the owner of the prohibited articles. It is this association, and this alone, which constitutes their crime. Their being in the same vessel exposes them to no forfeiture unless they belong to the same person.

In the case under consideration, the information does not allege that the innocent and the prohibited articles did belong to the same person.

The first question made for the consideration of the court is this: Will this information support a sentence of condemnation pronounced against the vessel and the innocent part of the cargo?

That the information states a case by which no forfeiture of the

ship or the innocent part of the cargo has been incurred, unless its defectiveness be cured by the allegation that the act was done contrary to, and in violation of the provisions of the statute, has been already fully shown.

It is not controverted that in all proceedings in courts of common law, either against the person or the thing for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of the provisions of a particular statute, will not justify condemnation, unless, independent of this allegation, a case be stated which shows that the law has been violated. The reference to the statute may direct the attention of the court, and of the accused, to the particular statute by which the prosecution is to be sustained, but forms no part of the description of the offence. The importance of this principle to a fair administration of justice, to that certainty introduced and demanded by the free genius of our institutions in all prosecutions for offences against the laws, is too apparent to require elucidation, and the principle itself is too familiar not to suggest itself to every gentleman of the profession.

Does this rule apply to informations in a court of admiralty?

It is not contended that all those technical niceties which
*are unimportant in themselves, and standing only on pre- [* 394]
cedents of which the reason cannot be discerned, should be transplanted from the courts of common law into the courts of admiralty. But a rule so essential to justice and fair proceeding as that which requires a substantial statement of the offence upon which the prosecution is founded, must be the rule of every court where justice is the object, and cannot be satisfied by a general reference to the provisions of a statute. It would require a series of clear and unequivocal precedents to show that this rule is dispensed with in courts of admiralty, sitting for the trial of offences against municipal law.

It is, upon these and other reasons, the opinion of the court, that the information is not made good by the allegation that the offence was committed against the provisions of certain sections of the act of congress.

Is it cured by any evidence showing that in point of fact the vessel and cargo are liable to forfeiture?

The rule that a man shall not be charged with one crime and convicted of another, may sometimes cover real guilt, but its observance is essential to the preservation of innocence. It is only a modification of this rule, that the accusation on which the prosecution is founded, should state the crime which is to be proved, and state such a crime as will justify the judgment to be pronounced.

The reasons for this rule are,

1st. That the party accused may know against what charge to direct his defence.

2d. That the court may see, with judicial eyes, that the fact alleged to have been committed is an offence against the laws, and may also discern the punishment annexed by law to the specific offence. These reasons apply to prosecutions in courts of admiralty with as much force as to prosecutions in other courts. It is, therefore, a maxim of the civil law that a decree must be *secundum alegata* as well as *secundum probata.* It would seem to be a maxim essential to the due administration of justice in all courts.

[* 395]

It is the opinion of the court that this information will not justify a sentence condemning the schooner Hoppet, and that part of her cargo which is not alleged to be of the growth, produce, or manufacture of either France or Great Britain, or the dependencies of either of those powers, whatever the fact may be.

There are certain wines imported in this vessel alleged to be of the growth, produce, or manufacture of France. These wines were exported from the United States to St. Bartholomew's, where they were purchased by the consignee and shipped to New Orleans. It is contended that, having been imported into the United States previous to the passage of the non-intercourse law, their exportation and reimportation does not subject them to the penalties of that law. But the court is unanimously of opinion that they come completely within the provisions of the act of congress.

It is the opinion of the court, that there is no error in that part of the sentence in the district court of Orleans, which condemns the wines in the information mentioned as forfeited to the United States, but that there is error in that part of the sentence which condemns the schooner Hoppet and the residue of her cargo.

This court doth therefore adjudge and order that so much of the sentence of the district court as condemns the schooner Hoppet and the thirty-five hogsheads of molasses, five barrels of molasses, twelve dozen of cocoa-nuts, and twelve pounds of starch, part of the cargo of the said schooner, be and the same is hereby reversed and annulled; and the said sentence, as to the residue of the cargo, is in all things affirmed.

7 C. 496, 570; 9 W. 391.

The Mutual Assurance Society v. Korn and Wisemiller.[1]

7 C. 396.

An amendment of the charter of a Mutual Insurance Company, made by the legislature at the request of the company, empowering them to divide their risks into two classes, and to value each risk anew, is valid, and a by-law to carry this into effect is in conformity with the nature of the institution, and binding on members, who subsequent to the Amendatory Act assented generally to the constitution and laws of the company.

Error to the circuit court for the District of Columbia.

The mutual assurance society against fire, &c., was incorporated by an act of the legislature of Virginia, in 1795.

According to the original plan of the institution, the houses in the towns and country were blended together in one general mass, and were mutually pledged to each other, to make good the losses which might be respectively sustained by fire.

In January, 1805, the legislature of Virginia, at the request of the society, passed a law changing the original plan of the institution, by separating the town buildings from those in the country, and making the town buildings liable only for town losses, and the country buildings for country losses. This law directed that there should be a revaluation of the buildings which had been previously insured; and authorized the society, as in the first instance, to fix the rates of hazard, and make such by-laws, rules, and regulations as they might think proper.

The society was authorized to recover its debts by motion, in a summary manner.

Under the act of 1805, the society made a new tariff of rates of hazard.

The houses of the defendants were revalued under the act. The revaluation was less than the original valuation; but the rate of hazard, or in other words, the premium for the insurance, was increased under the new regulation.

*By the third section of a by-law of the society made in [*397] January, 1805, under the authority of their original act of incorporation and of the act of 1805, it is enacted, "that if the revaluation of any building shall prove it to be of less value than that at which it was insured, there shall be no demand against the society of restitution of any part of the premium which may have been paid, and the proprietor of such building shall pay the additional premium

[1] 6 C. 192.

(if the materials of which his building be erected, or its contiguity require it) which according to the new rates of hazard ought to be paid."

In July, 1805, the defendants, Korn and Wisemiller, agreeably to a form prescribed by the society, made a declaration, under their hands and seals, as follows: "We do hereby declare and affirm, that we hold the above-mentioned buildings, with the land on which they stand, in fee simple; and that they are not, nor shall be insured elsewhere; and that we will abide, observe, and adhere to the constitution, rules, and regulations which are already established, or may hereafter be established by a majority of the insured, present in person, or by representatives, or by the majority of the property insured, represented either by the persons themselves, or their proxy duly authorized, or their deputy, as established by law, at any general meeting to be held by the said assurance society; or which are or hereafter may be established by the president and directors of the society."

To this declaration were annexed a plat, description, and new valuation of the buildings insured.

The buildings had been originally insured by the defendants in the year 1796.

The sum now claimed of the defendants was for the additional premium arising out of the increased rates of hazard according to the new regulations, made in January, 1805.

Swann, for the plaintiffs in error.

C. Lee, for the defendants.

[*398] *JOHNSON, J., delivered the opinion of the court, as follows:—

In the case decided between Atkinson and these plaintiffs, February term, 1810, the question arose on the construction of the 7th section of the act of 1805, and the additional premium in that case was imposed upon a revaluation without relation to a change in the rates of premium, but resulting from the increased valuation.

In this case, the sum demanded arises from the changes [*399] made in the rates of premium, arising from a *variation of risk; to equalize which the 8th article of the present rules of the society requires an additional percentage to be paid by the present members of the company, in conformity to what is to be imposed upon subsequent applicants for insurance. And it is contended that the contract being complete between the parties, the insurers cannot add to the consideration to be paid for insurance. In general

this doctrine is unquestionably correct, but peculiar circumstances except this from ordinary cases. This subject was considered in the quoted case decided between these same parties in February, 1810. It is there laid down, and on reflection we are confirmed in the opinion, that in the capacity of an individual of the body corporate the defendants are bound by the by-laws of the society, as far as is consistent with the nature of its institution.

This case is within the 4th section of the 8th article of those by-laws, and therefore the judgment below ought to have been for the plaintiffs.

Judgment reversed.

Webster and Ford *v.* Hoban.

7 C. 399.

A stipulation in a contract of sale of land, that if the purchaser fail to comply with the terms of sale within thirty days, the land shall then be sold for account of the purchaser, gives him a right to such resale, and if not made no action for damages lies against him.

Error to the circuit court for the District of Columbia, in a special action on the case, by the plaintiffs in error, against the defendant in error, for not paying the purchase-money for a house sold by the plaintiffs to the defendant, at public auction. The case is stated in the opinion of the court

Jones, for the plaintiffs in error.

* Livingston, J., delivered the opinion of the court, as fol- [*401] lows: —

If there ever existed a valid agreement between these parties in relation to the house in question, on which the court gives no opinion, the terms of it must be sought for in the articles exhibited by the auctioneer, at the time of sale. Of these, two only bear on this case. These were, "that the purchaser should secure the purchase-money, with interest, by his promissory notes, with two approved indorsers, payable in six and twelve months" — and "that the purchaser should be allowed thirty days to comply with these terms, at which time, in case of compliance, he was to receive a good and complete title to the property, and on failing to comply within the thirty days, the property was then to be resold on account of the first purchaser."

The plaintiffs offered no evidence of any resale, or of any deficiency arising thereon, but contended that the remedy by a resale was merely cumulative, and did not take away the right of action against the defendant, for his violation of the contract. Such is not the opinion of this court. The vendee, by the terms of sale, had an option of taking the estate after it was bid off to him, and in case of [*402] refusal, of having it sold again *on his account. It might have produced more than on the first sale, in which case the surplus would have belonged to him; or the same price might have been obtained, and then he would have lost nothing; or it might have sold for less, and then, by paying the difference which would have formed his whole loss, he would not have been exposed, as he must be, if this action proceeds to have damages assessed against him, by some uncertain and arbitrary or unsatisfactory rule, which might be adopted by a jury. Of these advantages which were reserved to him by the terms of the auction, the plaintiff had no right to deprive him. The court is further of opinion, that nothing which was done after the sale at all varied the right of the parties. The judgment below is affirmed, with costs.

The Maryland Insurance Company v. Wood.[1]

7 C. 402.

Notice from the British government, that a blockade will not be considered as existing without an actual investment, and that vessels bound to an invested port will not be captured, unless previously warned off, justifies the master of an American vessel who has been warned off, but has, subsequently, reasonable ground to believe the blockade has ceased, in returning to make inquiry off the port, intending to proceed elsewhere if the blockade still continues.

Error to the circuit court for the district of Maryland, in an action of covenant on a policy upon the schooner William and Mary, "at and from Baltimore to Laguira, with liberty of one other neighboring port, and at and from them or either of them back to Baltimore." "Warranted by the assured to be an American bottom, proof of which to be required in the United States only."

The former judgment of the circuit court, in this case, having been reversed, and the cause remanded for a new trial, the verdict and judgment were again in favor of the original plaintiff. The defendants

[1] 6 C. 29.

took only one bill of exceptions, which stated the execution of the policy, the sailing of the vessel, with proper documents, as an American bottom, from Baltimore on the 8th of March, 1805, upon the voyage insured; her arrival off Laguira on the 24th of the same month, where she remained three days laying off and on, vainly endeavoring to obtain permission to enter the port, and on the 31st sailed towards the port of *Amsterdam, in the Island [*403] of Curraçoa, by the direct and accustomed route, with a view and intention of ascertaining, by inquiry of British ships of war, or other vessels, whether the port of Amsterdam was then in a state of blockade, and to enter it if it should not be blockaded, but if it should be blockaded, not to attempt to enter it, but to proceed to St. Thomas or Porto Rico. That Amsterdam was a neighboring port to Laguira, being distant about 147 miles. That when she approached Amsterdam, being distant about 30 miles, the master discovered a British vessel at the distance of 21 miles, whereupon he altered the course of the schooner, and stood directly towards the British vessel for the purpose of inquiring whether Amsterdam was still in a state of blockade; that while so standing for the British vessel, which was a frigate then actually supporting the blockade of the port of Amsterdam, the schooner was captured by the frigate and sent into Jamaica, and there condemned for breach of the blockade of the port of Amsterdam, whereby she was wholly lost to the plaintiff. That on the 16th of May, 1805, the plaintiff having received intelligence of the capture, abandoned the vessel in due time to the underwriters, who refused to accept the abandonment.

That on the 27th of October, 1803, the government of the United States made to the British government, through its *chargé d'affaires* in the United States, a representation on the subject of a blockade, then recently notified, of the Islands of Martinique and Guadaloupe; which representation is set forth at large in the bill of exceptions, being a letter from Mr. Madison, then secretary of state, to Mr. Thornton, the British *chargé d'affaires*, dated the 27th of October, 1803.

That on the 5th of January, 1804, the British government, in consequence of that representation, issued an order to its commanding naval officer in the West Indies, and to its courts of vice-admiralty there, relative to the blockade of Martinique and Guadaloupe; which order is as follows: —

"ADMIRALTY OFFICE, 5th January, 1804.

"SIR: Having communicated to the lords of the admiralty, Lord Hawkesbury's letter of the 23d ult., inclosing the *copy of a despatch, which his lordship had received from [*404] Mr. Thornton, his majesty's *chargé d'affaires* in America, on

the subject of the blockade of the Islands of Martinique and Guadaloupe, together with the report of the advocate-general thereupon, I have their lordships' commands to acquaint you for his lordship's information, that they have sent orders to Commodore Hood not to consider any blockade of those islands as existing, unless in respect of particular ports which may be actually invested, and then not to capture vessels bound to such ports unless they shall have been previously warned not to enter them; and that they have also sent the necessary directions on the subject to the judges of the vice-admiralty courts in the West Indies and America.

"I am, &c.,

"EVAN NEPEAN.

"GEORGE HAMMOND, Esq."

That on the 12th of April, 1804, the British government, by its minister plenipotentiary in the United States, communicated the aforesaid order to the government of the United States, who caused it to be immediately published in the public newspapers.

That on the same 12th of April, 1804, the said British minister plenipotentiary officially made known to the government of the United States, that the siege of the island of Curraçoa had been converted into a blockade, which communication was as follows:—

"MR. MERRY TO MR. MADISON.

"WASHINGTON, April 12th, 1804.

"SIR: I have the honor to acquaint you that I have just received a letter from rear admiral Sir John Duckworth, commander-in-chief of his Majesty's squadron at Jamaica, dated the 2d of last month, in which he desires me to communicate to the government of the United States, that he has found it expedient for his Majesty's service to convert the siege, which he lately attempted, of Curraçoa, into a blockade of that island.

[*405] * "I cannot doubt, sir, that this blockade will be conducted conformably to the instructions which (as I have the honor to acquaint you in another letter of this date) have been recently sent on this subject, to the commander-in-chief of his Majesty's forces, and to the judges of the vice-admiralty courts in the West Indies, should the smallness of the Island of Curraçoa still render necessary any distinction of the investment being confined to particular ports.

"I have the honor to be, &c.,

"ANT. MERRY."

That Travers, master of the schooner William and Mary, heard a

report at Baltimore, before he sailed, that Amsterdam was in a state of blockade; and that he was informed, before he sailed from Baltimore, by the master of an American vessel, that about four months before the time of giving that information, he arrived with his vessel near the port of Amsterdam, and there met with a squadron of British ships of war then blockading that port, and was warned off by the commander of the squadron, with his register indorsed in the usual manner.

That Travers, in the course of his voyage, fell in with a strong French squadron, in lat. 15, long. 63, which was sailing westward. That the port of Amsterdam is in lat. 11 deg. 55 min., long. 68.

That while laying off Laguira to endeavor to obtain permission to enter the port, or to anchor his vessel, he was informed by a merchant at Laguira, to whom he had been introduced by a letter, and through whom he made application for permission as aforesaid, that the port of Amsterdam was then free from blockade; and was advised by the said merchant to proceed thither with his vessel; that the port of Laguira and all the ports on the Spanish main were then shut against foreigners, whereby he was prevented from going on shore, and from making inquiries otherwise than by writing from his vessel to some person on shore.

That the Island of Buenos Ayres was then a dependency of Curraçoa, distant from it about twenty miles east, and *is [*406] a small island having no port, except a roadstead about the middle of its length on the east side, where there was a small battery and military post. That the cruising ground of vessels blockading Curraçoa, was between that island and Buenos Ayres, which latter was included in the blockade, as were also all the other parts of the Island of Curraçoa. That Travers did not attempt to enter the port of Amsterdam, nor sail towards it with an intention of entering it if blockaded, but merely for the purpose of ascertaining, by any lawful and proper means in his power, whether it was still in a state of blockade, of entering it if it was not, and of proceeding elsewhere if it was.

That when he sailed from Laguira as aforesaid, he had, from the facts and circumstances above mentioned, reasonable ground of belief that the blockade had ceased, and had no means of obtaining any further information on the subject at any neighboring port or place.

Whereupon the plaintiff prayed the court to instruct the jury that if they believed the matters so given in evidence by him, then his right of recovery in this action is not affected by the conduct of Travers in proceeding as aforesaid from Laguira towards Amsterdam for the purposes aforesaid, which instruction the court gave, and also the further

direction, that if they should believe that Travers intended, while at Laguira, to violate the blockade of Amsterdam, and attempted it by sailing towards that port, and within the limits of the cruising ground; in such case his conduct was unlawful, and the defendants were thereby discharged from any responsibility upon the policy.

To this instruction the defendants excepted and brought their writ of error.

Martin, for plaintiffs.

Harper, for the defendants.

[*407] * LIVINGSTON, J., delivered the opinion of the court in writing, as follows: —

It is the opinion of the court, that the communication of the British minister to the American government on the 12th of April, 1804, relative to the blockade of Curraçoa, furnished a sufficient [*408] excuse for the assured's proceeding * towards that island for the purpose of inquiring as to its continuance, and that his doing so was no violation of his neutrality.

The court does not mean to be understood as giving any opinion on the effect of such conduct if no such communication had been made.

The judgment of the circuit court is affirmed, with costs.

FERGUSON *v.* HARWOOD.

7 C. 408.

Under the act of May 26, 1790, (1 Stats. at Large, 122,) if a record have the attestation of the clerk and the seal of the court, together with the certificate of the presiding judge that the attestation is in due form, no evidence that the attestation is not in due form is admissible.

Docket entries of another court are not admissible without laying some foundation by showing why a copy of the record is not produced.

If a declaration on a contract, by mistake, contain the name of the vendee, in a context which shows that the vendor was intended, the variance is not material.

ERROR to the circuit court for the District of Columbia, in an action of *assumpsit*, brought by Harwood against Ferguson, to recover the value of three hogsheads of tobacco, upon the following agreement, (after describing the hogsheads by their numbers, marks, and weights,) namely: —

"Upper Marlborough, June 16th, 1808.

"Received of Walter W. Harwood, as one of the administrators of William Eversfield Berry, deceased, in part of my claim against said estate, the three hogsheads of crop tobacco, as above stated, to be allowed p. ct. the highest six months' credit price at this place during that time after the rescinding of the embargo. I have put into the hands of the aforesaid Walter W. Harwood, a bond of conveyance given by Elisha Berry to his son, William E. Berry, dated March 14th, 1798, for the purpose of recovering the property therein mentioned, now depending in a suit in Prince George's county court. If the property is not recovered in the aforesaid bond of conveyance, I hereby bind myself, my heirs, executors, and administrators to return the above three hogsheads of tobacco, with legal interest, or the value thereof in money, to the aforesaid Walter W. Harwood, or to his heirs or assigns.

(Signed) ENOS D. FERGUSON."

The material facts, and the questions raised, appear in the opinion of the court.

*F. S. *Key*, for the plaintiff. [*410]

*J. *Law*, for the defendant. [*411]

*STORY, J., delivered the opinion of the court, as follows: [*412]

Several exceptions have been taken in this cause. The first proceeds on the ground that the record was not authenticated by the clerk in due form of law. The statute of the United States of the 26th of May, 1790, declares that the records and judicial proceedings of the courts of any State shall be proved and admitted in any other court within the United States, by the attestation of the clerk and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, as the case may be, that the said attestation is in due form of law. It is conceded that such a certificate accompanied the record objected to. It is, therefore, a case within the words of the law, and the court below were precluded from receiving any other evidence to show that the attestation was not in due form of law. The record so authenticated was properly admitted in evidence.

Even if the points had been open, the court are not satisfied that any material variance existed between the attestations of the different clerks.

The court are also of opinion that the second exception cannot be

sustained. The writing produced did not purport to be a record, but a mere transcript of minutes extracted from the docket of the court. There is no foundation laid to show its admissibility in the cause.

[*413] * The third exception has presented the chief difficulty which we have felt in deciding the cause. It is addressed to the variances between the declaration and the contract produced in evidence. The inducement of the declaration alleges "that the said Walter, as one of the administrators of William E. Berry, deceased, on, &c., at, &c., delivered unto the said Enos, in part of his claim against the estate of the said William, three hogsheads of crop tobacco, &c., he, the said Enos, to be allowed per cent. therefor the highest six months' credit price at the place aforesaid during that time, after reseinding the embargo." The contract produced in evidence is without the words "he the said Enos." There is, therefore, a literal variance, and its effect depends upon the consideration whether it materially changes the contract.

In general, courts of law lean against an extension of the principles applied to cases of variance. Mistakes of this nature are usually mere slips of attorneys, and do not touch the merits of the case. Lord Mansfield has well observed that it is extremely hard upon the party to be turned round and put to expense from such mistakes of his counsel, and it is hard also upon the profession.

It will be recollected that this does not purport on the face of the declaration to be a description of a written instrument, nor the recital of a deed or record *in hæc verba*. In respect to the latter, trifling variances have been deemed fatal; but as to the former, a more liberal rule has been adopted. In setting forth the material parts of a deed or other written instruments, it is not necessary to do it in letters and words. It will be sufficient to state the substance and legal effect. Whatever, however, is alleged, should be truly alleged. A contract substantially different in description or effect, would not support the averment of the declaration.

In the case at bar, it is very clear that the word "Enos" was by a mere slip inserted instead of "Walter." It is repugnant to the sense and meaning of the contract that the creditor who received the tobacco at a stipulated price in part payment of his debt, should allow to himself that price. From the nature of the transaction

[*414] the debtor must be entitled to the allowance. * If the same words had been introduced into the written contract itself, they must have been rejected as nonsensical or repugnant, or have had imposed upon them a sense exactly the same as if the words had been "the said Walter." And a declaration which should altogether

have omitted the words, or have given that legal sense, would have well supported an action. Can a different result take place, where the repugnancy is not in the contract, but in the declaration? A majority of the court are clearly of opinion that it cannot. The words of a contract stated in a declaration, must have the same legal construction as they would have in the contract itself.

The context manifestly, in this case, shows the repugnancy. It is impossible to read the declaration and not to perceive that the price is to be allowed to the debtor, and not to the creditor. Many cases have been cited where the variance has been held fatal, but no one comes up to the present. The case of Bristow *v.* Wright, Doug. 665, is the strongest. There the demise was alleged to be at a yearly rent payable quarterly. The demise proved was without any stipulation as to the times of payment. The court held that the demise laid and that proved were not the same. But if the demise had been truly laid, and the declaration had proceeded to allege that the rent was to be paid by the lessor to the lessee, we think that the action might well have been maintained notwithstanding the repugnancy. That in effect would be the same as the present case.

In King *v.* Pippet, 1 T. R. 235, where the declaration set forth a precept, and improperly inserted the word "if," which made it conditional, the court rejected the word, and held the variance immaterial. The court said it was impossible to read the declaration and not to know what it should be. There are other cases to the like effect.

We are therefore satisfied that the variance is immaterial, because it does not change the nature of the contract, which must receive the same legal construction, whether the words be in or out of the declaration.

A second variance is supposed in the allegation that the promise was to return the tobacco or its value, if *the pro- [*415] perty in the bond of conveyance mentioned in the declaration was not recovered in the suit then depending for the recovery thereof; whereas the contract produced in evidence contained no limitation to a recovery in that particular suit. We are satisfied, however, that the plaintiff has declared according to the true intent of the parties, as apparent on the contract. It could never have been their intention to postpone the right to a return of the tobacco or its value, beyond the time of a recovery or failure in the suit then depending. Any other construction would have left the rights of the parties in suspense for an indefinite period, wholly inconsistent with the avowed objects of the contract.

On the whole, it is the opinion of the court that the judgment be affirmed, with costs.

Biays v. The Chesapeake Insurance Company.

7 C. 415.

Under a warranty by the assured, "free from average, unless general," the underwriter is not liable for a partial loss.

The destruction of part of a cargo, consisting of the same kind of articles, is a partial loss only; not a total loss of such part.

The clause authorizing the assured, in case of any loss or damage, to sue, labor, &c., applies only to losses within the policy.

Error to the circuit court of the United States, for the district of Maryland, in an action of covenant upon a policy of insurance.

[*416] *On a case stated, the judgment of the court below was for the defendants; on which the plaintiff brought his writ of error.

Harper, for plaintiff.

[*417] *Livingston, J., delivered the opinion of the court, as follows: —

This is an insurance on hides, "warranted by the assured free from average, unless general." The declaration is for a total loss by perils of the seas, but it came out in evidence, that 3,280 hides, the whole number insured being 14,565, were put on board of a lighter, to be transported from the vessel to their place of destination — that the lighter on her passage to the shore was sunk, by which accident, 789 of the hides, of the value of $4,000, were totally lost, and the residue, to the number of 2,491 more, were fished up and saved, at the cost of $6,000, which were paid by the plaintiff. The hides thus saved were delivered to the plaintiff's agent, and sold on his account. The whole sum, insured on the cargo of hides by the defendants, was $25,000.

On this state of facts it has been contended, that this insurance, although on perishable commodities, being in gross on a cargo consisting of a distinct number of articles, there may be a total loss as to some of them, although others be saved, and that, for the part of the cargo thus totally lost, the underwriters are liable, notwithstanding the agreement respecting what are generally called memorandum articles. In support of this position it is said that the only intention of the parties, in coming to this agreement, was to obviate disputes concerning losses arising from the perishable nature of the goods insured, but that as this loss happened in another way, and is total as to the portion of the property in question, it ought not to be considered as excluded by the memorandum.

[*418] *Whatever may have been the motive for the introduction of this clause into policies of insurance, which was done as

early as the year 1749, and most probably with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality — or whatever ambiguity may once have existed from the term average being used in different senses, that is, as signifying a contribution to a general loss, and also a particular or partial injury falling on the subject insured, it is well understood at the present day, with respect to such articles, that underwriters are free from all partial losses of every kind which do not arise from a contribution towards a general average. It only remains then to examine, and so the question has properly been treated at bar, whether the hides, which were sunk and not reclaimed, constituted a total or partial loss, within the meaning of this policy. It has been considered as total by the counsel of the assured, but the court cannot perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board, not quite 800 were lost, making in point of value somewhat less than one sixth part of the sum insured by this policy. If there were no memorandum in the way, and the plaintiff had gone on to recover, as in that case he might have done, it is perceived at once that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained. But without having recourse to any reasoning on the subject, the proposition appears too self-evident not to command universal assent, that when only a part of a cargo, consisting all of the same kind of articles, is lost in any way whatever, and the residue, which in this case amounts to much the greatest part, arrives in safety at its port of destination, the loss cannot but be partial, and that this must forever be so, as long as a part continues to be less than the whole. This loss then being a particular loss only, and not resulting from a general average, the court is of opinion that the defendants are not liable for it.

Having disposed of this point, it would seem as if much difficulty could not occur in deciding the other question, which has been made in this cause, and that is — whether the assured is not entitled to recover the *expenses which he was put to in saving [* 419] part of the hides which had sunk.

This liability is supposed to result from that clause in the policy, which authorizes the assured, " in case of any loss or damage, to sue labor, and travel for, in and about the defence, safeguard, and recovery of the goods, or any part thereof, to the charges whereof the assurers will contribute according to the amount of the sum insured." If this clause be construed with reference to what is most evidently its subject-matter, that is a loss within the policy, and in connection with other parts of the instrument, it seems impossible to misunder-

stand it, or that it should receive so extensive an application as the plaintiff is desirous of giving to it. The parties certainly meant to apply it only to the case of those losses or injuries for which the assurers, if they had happened, would have been responsible. Having, in such cases only, an interest in rescuing or relieving the property, it is reasonable that then only they should defray the charges incurred by an effort made for that purpose; but when a loss takes place which cannot be thrown on them, it would require a much stronger and more explicit stipulation than we find in the policy to render them liable to contribute to such expenses. If a cargo be insured for a long voyage against sea risks only, and a capture intervene the very day after the vessel leaves port, it is very clear that the underwriter is not only not liable for such a loss, but that he derives an advantage from it, as his risk may be terminated thereby, and the whole premium be earned; and yet, if the construction now endeavored to be put on this clause should prevail, all the expenses of claiming a property, in which he had no interest, and which if condemned is a matter of indifference to him, and all the costs of pursuing it through an almost endless litigation, would be thrown, whether the pursuit were successful or otherwise, on an insurer who had taken care to restrict his liability to losses by perils of the sea only. The court cannot subscribe to such an interpretation, when a more natural, rational, and obvious one, and that without departing from the letter of the instrument, presents itself, which is, that this clause can never apply but in such cases as would, if they happen, be losses, [* 420] either partial or total, within the meaning *of the policy.

We are therefore of opinion that the underwriters, not being answerable for the principal loss in this case, they cannot be so for the subsequent expenses which were incurred in recovering the property.

The judgment of the court below is affirmed; with costs.

1 W. 219.

Stark v. The Chesapeake Insurance Company.

7 C. 420.

The judgment of a court of competent jurisdiction admitting an alien to be a citizen, need not find the facts requisite by law to entitle the applicant to be so admitted.

Error to the circuit court of the United States for the district of

Maryland. On the trial in that court, it became necessary for the plaintiff to prove his citizenship, and to do so he introduced a duly authenticated copy of a record of the court of common pleas in the State of Pennsylvania, which contained a petition by the plaintiff to be admitted to citizenship, proof of residence, an oath of allegiance, and then the record stated that he was admitted by the court to become a citizen, &c. It was objected that the record did not show any previous declaration, and this objection having been sustained by the circuit court, the plaintiff excepted, and brought his writ of error.

The court, without pronouncing any opinion, reversed the judgment of the circuit court.

Harper, for the plaintiff.

Martin, for the defendant.

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* WILLIAM WILLIAMS and others, Appellants, *v.* GEORGE ARMROYD and others, Appellees. [* 423]

7 C. 423.

The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and works an absolute change of the property.

A sale, before condemnation, by one acting under the possession of the captor, does not divest the court of jurisdiction, and the condemnation relates back to the capture, affirms its legality, and establishes the title of the purchaser.

A foreign sentence of a competent court, though avowedly contrary to the law of nations, is valid here, because not examinable. But congress might make it examinable by our courts, if it thought fit.

APPEAL from a decree of the circuit court of the United States for the district of Pennsylvania. The only material fact not stated in the opinion of the court was, that St. Martin's was a Dutch island, and the sale spoken of was by the order of the Dutch governor of that place.

L. Law and *Dana*, for the appellants.

J. R. Ingersoll, for the appellees.

[* 432] * MARSHALL, C. J., delivered the opinion of the court, as follows: —

A vessel, with a cargo belonging in part to the appellants, was captured on the high seas, on the 20th of August, 1809, by a French privateer, and carried to St. Martin's, where the vessel and cargo were sold, by order of the governor, at public auction, and part of the cargo purchased and sent to the appellees in Philadelphia. After the sale, the vessel and cargo were condemned by the court of prize, sitting at Guadaloupe, professedly for a violation of the Milan decree in trading to a dependence of England. On the arrival of the goods, they were claimed by the original owner, who filed a libel for them. In the district court they were adjudged to him. The circuit court reversed that sentence, and from the judgment of the circuit court there is an appeal to this court.

It appears to be settled in this country, that the sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and operates as an absolute change of the property. By such sentence, the right of the former owner is lost, and a complete title given to the person who claims under the decree. No court of coördinate jurisdiction can examine the sentence. The question, therefore, respecting its conformity to general or municipal law, can never arise, for no coördinate tribunal is capable of making the inquiry. The decision, in the case of Hudson & Smith *v.* Guestier, reported in 6 Cranch, is considered as fully establishing this principle.

It is contended that the sentence, in this case, has not changed the property, because—

[*433] *1st. The sale was made under the direction of the governor of St. Martin's, before the sentence of condemnation was pronounced.

2d. The sentence proves its own illegality, because it purports to be made under a decree which the government of the United States has declared to be subversive of neutral rights and national law.

1st. In support of the first objection, it has been urged, that the jurisdiction of the court depends on the possession of the thing; that a sentence is a formal decision, by which a forcible possession is converted into a civil right; and that the possession being gone, there remains nothing on which the sentence can operate.

However just this reasoning may be when applied to a case, in which the possession of the captor has been divested by an adversary force; as in the cases of recapture, rescue, or escape; its correctness is not admitted when applied to this case. The possession is not an adversary possession, but the possession of a person claiming under the captor. The sale was made on the application of the captor, and the possession of the vendee is a continuance of his possession.

The capture is made by and for the government; and the condemnation relates back to the capture, and affirms its legality.

2d. That the sentence is avowedly made under a decree subversive of the law of nations, will not help the appellant's case, in a court which cannot revise, correct, or even examine that sentence. If an erroneous judgment binds the property on which it acts, it will not bind that property the less because its error is apparent. Of that error, advantage can be taken only in a court which is capable of correcting it.

It is true that in this case there is the less difficulty in saying, that the edict under which this sentence was pronounced, is a direct and flagrant violation of national law, because the declaration has already been made by the legislature of the Union. But what consequences attend this legislative declaration? Unquestionably, the *legislature which was competent to make it, was also com- [*434] petent to limit its operation, or to give it effect by the employment of such means as its own wisdom should suggest. Had one of these been, that all sentences pronounced under it should be considered as void, and incapable of changing the property they professed to condemn, this court could not have hesitated to recognize the title of the original owner in this case. But the legislature has not chosen to declare sentences of condemnation, pronounced under this unjustifiable decree, absolutely void. It has not interfered with them. They retain, therefore, the obligation common to all sentences whether erroneous or otherwise, and bind the property which is their object; whatever opinion other coördinate tribunals may entertain of their own propriety, or of the laws under which they were rendered.

The sentence is affirmed, with costs.

7 C. 107; 3 P. 193; 13 H. 493.

SMITH and BUCHANAN *v.* THE DELAWARE INSURANCE COMPANY.

7 C. 434.

A verdict "for the defendants, subject to the opinion of the court upon the points reserved," does not authorize an absolute judgment for the defendants, unless the points reserved and the opinion of the court thereon, are stated on the record.

ERROR to the circuit court of the United States for the district of Maryland.

The jury found a verdict "for the defendants, subject to the opinion of the court on the points reserved." And judgment was thereupon rendered "for the defendants accordingly."

The plaintiffs, by their counsel, moved the court below that the points reserved and the opinion of the court upon those points, should be entered on the record.

[* 435] * The court did not act on this motion.

The defendants, it was said, would not agree to any arrangement by which the legal merits of the cause, as they appeared below, might come into discussion here.

Pinkney, attorney-general, for the plaintiffs.

Harper, for the defendants.

MARSHALL, C. J. The case is too plain for argument. The jury did not intend to find a general verdict; but to submit the points of law to the court. If the law had been for the plaintiffs, the court could only have awarded a *venire de novo*. The facts ought to have appeared, so that the judgment might have been either reversed or affirmed upon the merits.

Judgment reversed, and a new trial awarded.

[* 436] * HOLKER and others *v.* PARKER.

7 C. 436.

An attorney at law, as such, has authority to submit the cause to arbitration.

But an attorney at law, merely as such, has no right, strictly speaking, to make a compromise for his client.

THIS was an appeal from the circuit court for the district of Massachusetts, in a suit in chancery brought by Holker, and others, his assignees, against Parker, to set aside an award made under a rule of court in a suit at law in the same court between Holker and Parker.

The case, as stated by MARSHALL, C. J., in delivering the opinion of the court, was as follows:—

In the year 1782, John Holker, one of the plaintiffs in this cause, Daniel Parker, the defendant, and William Duer, who is dead insol-

vent, formed a trading company, under the name and firm of Daniel Parker & Co., of which Daniel Parker was the acting partner. After receiving large sums of money, and contracting debts to a great amount, Parker absconded from the United States, without making any settlement of his accounts. In the month of December, 1785, Holker commenced a suit against Parker, in the court of common pleas for the county of Philadelphia, where the said Parker had resided and carried on the business of the copartnership. This suit was commenced by attaching the effects of Parker in the hands of Thomas Fitzsimmons. In June, 1788, a judgment in favor of the said Holker was rendered on the verdict of a jury for the sum of 47,231*l.* 12*s.* 9*d.*, Pennsylvania currency, equal to $125,951.03. The property attached, amounting to $5,000, was sold and paid to the said Holker, towards satisfying this judgment.

Other attachments were laid by Holker on the property of Parker, and proceedings were also instituted against him by other persons, creditors of the company. On the 31st of December, 1788, while these were depending, an indenture of six parts was made and executed between said Parker by Andrew Craigie, his attorney, of the first part, John Holker of the second part, Samuel Rogers of the fourth part, by *Andrew Craigie, his attorney, Royal [*437] Flint of the fifth part, and sundry creditors of Daniel Parker & Co., of the sixth part. William Duer was named in the said indenture as of the third part, but never executed the deed.

The object of this deed was to convey to Royal Flint in trust for the creditors of Daniel Parker & Co., and for other purposes therein specified, the partnership effects of Geyer, De la Lande, and Fynye, to which Parker represented himself to be entitled, and which he had previously conveyed to the said Samuel Rogers. By this indenture the said Parker covenanted, among other things, that he would, within eight months from the date thereof, repair to Philadelphia personally, or by attorney, and then settle all the accounts of the company. It was further agreed that the said Parker and Holker should, within eight months from the date of the first indenture, reciprocally give bonds to each other in the penal sum of 50,000*l.* Pennsylvania currency, conditioned for the settlement of their respective accounts within ten months thereafter, and for payment of their several balances to Royal Flint and his successors for the trusts in the said indenture mentioned. The bonds to be assigned to the said Royal Flint or his successors in trust as aforesaid.

In consideration of the premises the said Holker, and also the said parties of the sixth part, severally covenanted with the said Parker that they would immediately "vacate, annul, discontinue, and with-

draw all suits, actions, and proceedings whatever, which they or any or either of them shall or may at any time or times heretofore have commenced, brought, or prosecuted against the said Daniel Parker or his estate, goods, chattels, or property in any court or place whatsoever in Europe or America, and shall and will place him, the said Daniel Parker, and his property, in the same situation as they were before the commencement of such suits or proceedings." And the said Holker further covenanted not to commence or prosecute any action against him, the said Parker, for any balance that might be due until after eighteen months after the eight months aforesaid should have expired.

[*438] The bonds were given, but Parker failed to comply * with the covenant for settling the accounts of the copartnership transactions.

The effects of Geyer, De la Lande, and Fynye, which were assigned to Royal Flint, being insufficient to satisfy previous charges on them, proved totally unproductive.

Debts to a large amount due from Daniel Parker & Co., were recovered from Holker, and paid by him.

On the 21st July, 1796, Holker made a power of attorney to James Lloyd, of Boston, for the purpose of recovering from the said Parker the moneys supposed to be due to him, and at the same time transmitted to the said Lloyd copies of the judgment obtained by him against Parker, in June, 1788, and of a judgment obtained against Holker by John Ross for the sum of 12,933*l.* 7*s.* 1*d.* Pennsylvania currency, equal to $34,488.95. This judgment was for a debt due from Daniel Parker & Co., was rendered subsequent to the indenture of six parts hereinbefore stated, and had been discharged by Holker.

Mr. Lloyd placed these papers in the hands of Mr. Lowell, an attorney at law of Boston, who instituted an action of debt on the judgment obtained by Holker against Parker. This suit was brought by way of attachment. At the June term, 1797, Daniel Parker appeared, by his attorney, and filed four several pleas in bar of the action, in all of which the indenture of six parts hereinbefore stated was pleaded, as a release of the judgment on which the suit was instituted.

The plaintiff's attorney prayed oyer of the instrument of which the defendant had made a profert in his pleas, and, in the October term, 1797, not having replied or demurred to the said pleas, entered into a rule of court, by which the said action and all demands were referred to Nathan Goodale, George Deblois, and Fisher Ames, Esqs., with liberty reserved to Holker of disagreeing to the rule thirty days after he should receive notice of it.

Notice of this rule was received by Holker in August, 1798, but

he does not appear to have been informed *that any liberty [*439] of dissenting from it was reserved to him. It would seem that he submitted to it with some repugnance, and under the idea that it was unavoidable.

On the 8th of September, 1798, Holker made an affidavit, which he transmitted to his attorney, stating many reasons why the referees should not immediately proceed to make up their award in the case, and showing that in the settlement of the complex accounts between Parker and himself, much testimony would be required respecting transactions both in Europe and America, and that so much depended on the entries in the books of the bank at Philadelphia, that the settlement ought to take place there. He declared, however, that he would endeavor to be prepared to appear before the arbitrators in the succeeding months of November or December, or sooner if practicable.

In October, 1798, the rule of reference was made absolute. Mr. Holker had assigned this claim to Mr. Lowell, the father of his attorney at law, the administrator of Mr. Russell, so far as would be necessary to satisfy a debt due to Russell's estate. On the 6th of November, 1798, Mr. Lloyd wrote a letter to Mr. Holker, informing him that his affidavit had been laid before the court, in consequence of which his cause had been continued until the succeeding June term. On the 23d of the same month Mr. Lloyd addressed another letter to Mr. Holker, informing him that the "referees would attend to his business whenever it might be convenient for him to appear before them."

Suits had been instituted against Holker, in Philadelphia, in which he had been compelled to give bail in large sums. He then resided in Virginia, and was arrested in Baltimore, by his bail, in April, 1799, and carried to Philadelphia, where he was enabled to obtain other bail on no other condition than the express stipulation of not proceeding to Boston. On the 18th of May he made an affidavit before the mayor of Philadelphia, stating that he was prevented by this detention from proceeding to Boston, in order to attend the referees in person as he proposed to do. That he was about petitioning the supreme court of Pennsylvania for a special court, which he had reason to believe he *should obtain in the course of the succeeding July or August, but that in the mean time it was [*440] utterly out of his power to go to Boston. This affidavit was transmitted to his attorney in Boston. On the 24th of June, Mr. Lowell addressed the following letter to Mr. Holker: —

"I received your affidavit through my friend Mr. Lloyd, and with much difficulty obtained a delay. The referees adjourned to the 1st

of September next, when the cause will go on at all events, whether you are here or not. As to success without your aid it is out of the question, as we know nothing of the cause, and as your subsequent covenants with Parker will appear to annihilate your claims under the judgment. Whether you will eventually succeed in getting a nominal judgment against Parker if you do attend, you alone can judge. I am rather inclined to think I could persuade the adverse counsel to give us a judgment for the whole or part of the property attached — ($7,200.) They appear to be heartily sick of defending Parker, as they know him to be immersed beyond hope of recovery, and are doubtful whether they will be compensated for their trouble. Whether some arrangement of this sort would not be advantageous to you if it can be effected, considering your doubt of recovery, and the certainty of Parker's inability to pay what may be decreed, you best can judge.

"Whatever you do on this point let it be explicit, as Mr. Lloyd and myself mean to avoid all responsibility, and every hazard of future blame. I beg you will inform me speedily what we shall do about your action, as the referees will meet in sixty days or thereabouts."

This letter was transmitted to Mr. Holker by Mr. Lloyd, who subjoined thereto the following letter:—

"Immediately on the receipt of your favor covering a memorial to the circuit court, I delivered them both to Mr. Lowell, who duly attended thereto; the result is communicated in the foregoing letter from that gentleman. His obtaining the delay is what could [*441] not have been calculated on. The court would *not have granted it. To avoid expense in feeing counsellors, it was acceded to by the other party.

"The period now fixed can no longer be protracted on any account whatsoever. From what I can learn of the disposition of the defendants, it is truly depicted to you in Mr. Lowell's letter; they would, as he observes, probably confess judgment for the greater part if not the whole of the property attached. It must be understood that they would do this only on the condition that they should receive a full discharge from you on account of Daniel Parker. You will please to let me receive your determination as soon as may be convenient."

These letters were never answered by Mr. Holker. A petition had been presented by Holker to the supreme court of Pennsylvania, to have his person liberated on delivering up all his property for the use of his creditors, in pursuance of a law of that State. This petition came on to be heard on the 13th of September, 1799 but was continued from time to time until the 14th day of April, 1800; when, by the judgment of that court, he was discharged from custody.

The referees made the following report to the circuit court during the October term, 1799.

"The subscribers, pursuant to the annexed rule, met at the office of Nathan Goodale, on the 8th day of June, 1799, after notifying John Lowell, Jr., esquire, attorney for the plaintiff, John Holker, and William Hull, esquire, attorney for said Daniel Parker, the said attorneys attending our meeting, and John Lowell, Jr., esquire, in behalf of said Holker, having asked a delay or adjournment until the 1st day of September then next, now last past, and on the said 1st day of September the referees having again met, and the said parties appearing by their attorneys, and having been fully heard, the said meeting was again adjourned, at the request of the said Lowell, until this day, being the 23d day of October, 1799, when the said attorneys having again appeared, and nothing further being offered in support of their several allegations, we do award that the said John Holker, the plaintiff, *recover against the said [*442] Daniel Parker the sum of $5,000, in full satisfaction and discharge of all debts, costs, judgments, executions, accounts, controversies, claims, or demands, subsisting between them, of what name or nature soever."

The award was read and accepted, and judgment immediately rendered for $5,000, without costs, which sum was received by the attorney of Mr. Holker, and the balance, after deducting costs and commissions, was paid to the administrator of Russell, to whom Holker was indebted, and to whom he had made an assignment of his claims against Parker, so far as it should be necessary to satisfy the said debt.

It appears that the evidences in support of Holker's claims, other than the two judgments which have been mentioned, were never in the hands of his counsel, and were consequently never laid before the referees; that the counsel for Holker never controverted the allegation made on the part of Parker, that the judgment obtained by Holker in the court for the county of Philadelphia, was released by the indenture of six parts; nor ever insisted that it was to be considered as *primâ facie* evidence, subject to such objections, or to such discounts as Parker might make. The accounts between the parties do not appear to have been examined, nor the judgment of the arbitrators exercised on any part of the case. The award for $5,000 was made with the consent of Parker's attorney, and without objection on the part of Holker's attorney. That transaction is thus stated by Mr. Lowell: "Some time before the trial, the counsel for Parker did lead this deponent to understand that, as they were desirous of closing the affair, they should not object to our taking judgment for the amount attached, but the deponent wholly and absolutely did

reject the said proposal. He however stated it to said Holker, and begged his instructions thereon, but said Holker never replied to said letter; when the referees met, and this deponent found they would proceed to final judgment against his client for defect of evidence, he, this deponent, stated the former offer, but the adverse counsel refused to agree to it, but said that they had no objection to our taking judgment if the referees saw fit for $5,000 instead of
[*443] * $7,200 or thereabouts, the amount attached; though they declared they had doubts whether on a final liquidation there would be so much due. The referees taking their admission against them awarded that sum. But it was never agreed by this deponent that such a sum should be taken in full of the said Holker's demands. It was no compromise, nor was there any secret understanding; but he deemed it his duty to obtain even this sum rather than an award, which would have been otherwise made, that the said Parker owed the said Holker nothing." The attorney for Mr. Parker, whose deposition is also in the record, states the transaction thus: "After a considerable examination of the accounts by the arbitrators without coming to a decision, Mr. Lowell agreed that they should award to Mr. Holker $5,000, in full of all demands, provided, I would agree to give security for the payment of the money to Mr. Holker or to his attorney, Mr. Parker being abroad. I agreed to it. We both agreed to it. It was done. When Mr. Lowell and myself had agreed, we stated our agreement to the arbitrators." To another interrogatory the same witness answers: "I did not recommend to the arbitrators any award until the parties had agreed upon a sum; myself and Mr. Lowell."

Two of the arbitrators are dead. The deposition of the third has been taken. He says that the award was founded entirely on the admission of Mr. Parker's attorney.

The correspondence of Mr. Holker with his attorneys, showed his confident reliance on the judgments placed in their hands as amounting to *primâ facie* evidence, and that his claims considerably exceeded those judgments. The evidence now taken in the cause swells them to a very great amount.

There is evidence that Daniel Parker was at the time much embarrassed in consequence of deep speculation in the national debt of France; and that he was certainly believed by the attorney of Mr. Holker to be insolvent. This was at that time the general impression. It was afterwards known to be erroneous.

[*444] * Mr. Holker instituted a suit against Mr. Parker, in France, where it was determined that he was barred by the judgment rendered against him in the circuit court of the United States, on the award.

Holker and his trustees have now brought this suit in the circuit court of the United States, sitting in chancery, praying that the award may be set aside in whole or in part, that the accounts between Holker and Parker may be settled, and that Parker may be decreed to pay the sum which shall appear to be due. Parker has pleaded the award and judgment thereon in bar of these claims and of any account.

On a hearing, the bill of the plaintiffs was dismissed, and from that decree an appeal was made to this court.

Harper, for the appellants.

* *Amory*, and *P. B. Key*, for the appellees. [*447]

* MARSHALL, C. J., after stating the facts of the case, delivered the opinion of the court, as follows: — [*449]

On the part of the appellants it is contended that an attorney at law has no power, without the consent of his client, to transfer a cause to other judges than those appointed by the laws, and to place it before a tribunal distinct from that before which the party himself has chosen to place it.

In this opinion, however, the majority of the court does not concur. It is believed to be the practice throughout the Union, for suits to be referred by consent of counsel without special authority, and this universal practice must be founded on a general conviction that the power of an attorney at law over the cause of his client extends to such a rule. Were it otherwise, courts could not justify the permission which they always grant, to enter a rule of reference, when consented to by counsel on both sides. In this case, however, the letter
* and affidavit of Mr. Holker, of the 8th of September, 1798, [*450]
manifests at least an acquiescence in the rule, which the opposite party had a right to consider as an assent to it.

The same letter and affidavit will meet the still stronger objection which has been made to the reference of matters not involved in the suit actually depending in court. They certainly impair very much the weight and influence of those arguments which have been urged against so much of the award as respects those demands of Holker which were not in suit.

The court, however, does not perceive, in the transactions which took place previous to the award itself, any circumstance which could justify a decree to set it aside. The great and real question in the cause is, has the award been made under such circumstances, and is it of such a character, that it ought to bind the parties?

In examining this question, it is natural to inquire whether this be in fact an award, in forming which the judgment of the arbitrators has been exercised, or a compromise wearing the dress of an award. The evidence upon this point is thought very clear. Nothing can be more explicit than the testimony of General Hull, who was the attorney of Mr. Parker. He states an agreement in the most express terms between himself and Mr. Lowell, on the sum for which the award should be given; and the arbitrator, whose deposition has been taken, declares that the award was made solely on the acknowledgment of the defendant's counsel.

To the deposition of Mr. Lowell himself great respect is due. He denies a compromise, but on examining his testimony the court is of opinion that his denial goes no further than to the form of an agreement. The facts he states prove one in substance. Believing himself that Holker's judgment against Parker was released, and that the referees would entirely disregard it, he himself not having insisted on it, or questioned the validity of the pleas in bar, he reminded Parker's attorney, in the presence of the referees, of his former offer to give $7,200 in satisfaction of all demands.

[*451] *It was impossible to misunderstand this declaration. It was substantially a proposition to accept an offer which had been formerly rejected. General Hull replied that he would not now give that sum, but would give $5,000. Mr. Lowell did not agree to accept this offer, but he did not reject it. He looked on silently, and saw the referees about to make up an award, not on the testimony of the cause, but on a declaration on the part of the defendant that he would give $5,000, made in answer to one from himself apparently clinging to a former offer to give $7,200. The referees necessarily construed this silence into consent, and Mr. Lowell was not unwilling that they should put this construction on it. He thought it his duty, he says, to secure even this sum for his client rather than have an award that Parker owed him nothing, which would have been equally obligatory.

This then is substantially a compromise, and not an award. It is difficult to examine this cause, and to feel the clear conviction which was felt by Mr. Lowell, that the referees, had the case of Holker been brought as fully before them as it was in the power of his attorney to bring it, and pressed as earnestly on them as its importance deserved, would have awarded that Parker owed him nothing.

Had not the sufficiency of the pleas in bar been impliedly admitted — had the legal operation of the covenant of six parts been seriously contested, it is far from being clear that the referees would have affirmed the sufficiency of these pleas, or have construed the cove-

nant to be a release of the judgment. There is certainly much reason to doubt whether the covenant of Holker, although it may be an independent covenant, amounts to a release of the judgment he had obtained against Parker. The mind of the referees does not appear to have been exercised on, or called to this question. They do not appear to have had a fair opportunity to form an opinion on it. It does not appear that the indenture itself was inspected by them, and the description given of it in the pleas is inaccurate. The pleas describe the covenant as containing the word "judgment," which it does not contain. The covenant is "to vacate, annul, discontinue, and withdraw, all * suits, actions, and proceedings [*452] whatever." The pleas introduce the word "judgment" in their description of the covenant; a word which essentially varies its construction. Had the real case been brought before the referees, and their attention been directed to this circumstance, it cannot be assumed as certain that they would have considered the judgment as vacated, or would have refused to receive it as *primâ facie* evidence of a claim to its full amount, open to such objections as Parker might make to it.

Had they even been of a different opinion, they could not have believed it certain that Parker, who had escaped from this country, leaving debts to an immense amount which Holker was compelled to pay, against whom, when only part of those debts were paid, Holker had obtained a judgment for $125,951.04, was not the debtor of Holker to a large amount. With this view of the case, had they understood that Holker was intercepted in his attempt to attend them, and detained by legal process, it ought not to have been supposed that they would have refused to suspend the award until the issue of his application to the supreme court of Pennsylvania for the liberation of his person should be known.

To this court, then, it appears that this award is not the judgment of the arbitrators in the cause, but a compromise between the attorneys, taking the form of an award, and a compromise made at a time when the cause was not so desperate as the attorney supposed it to be. It was a sacrifice of great and important interests at a time when that sacrifice does not appear to have been absolutely necessary. Has the attorney a right to make such a compromise?

Although an attorney at law, merely as such, has, strictly speaking, no right to make a compromise; yet a court would be disinclined to disturb one which was not so unreasonable in itself as to be exclaimed against by all, and to create an impression that the judgment of the attorney has been imposed on, or not fairly exercised in the case. But where the sacrifice is such as to leave it scarcely pos-

sible that, with a full knowledge of every circumstance, such
[*453] a compromise could be fairly * made, there can be no hesitation in saying that the compromise, being unauthorized, and being therefore in itself void, ought not to bind the injured party. Though it may assume the form of an award or of a judgment at law, the injured party, if his own conduct has been perfectly blameless, ought to be relieved against it. This opinion is the more reasonable because it is scarcely possible that, in such a case, the opposite party can be ignorant of the unfair advantage he is gaining. His conduct can seldom fail to be tainted with some disingenuous practice, or, if it has not, he knows that he is accepting a surrender of the rights of another from a man who is not authorized to make it.

The testimony in this cause accounts for the readiness with which Mr. Lowell acceded to the offer of General Hull. He acted under a mistake, and that mistake is fully disclosed in the record. He believed Parker to be irretrievably ruined. He thought him totally and absolutely insolvent. This impression was communicated to the referees. They too were of opinion that to drudge through the trunks of papers arrayed before them, for the purpose of ascertaining how much one insolvent owed another, would be a useless waste of time.

Mr. Lowell was apparently of opinion that nothing beyond the attached effects was worth pursuing. He believed sincerely that an award of $700,000 would not avail his client more than an award for $7,000, and that he should ill perform his duty if he put the attached effects in any hazard in the vain attempt to get a judgment for a larger sum. He could not, therefore, venture on any measure which might have produced a release of those effects. They were the sole object of his contemplation and pursuit. Those he knew to be substance, every thing further he thought a shadow. This opinion seems to have influenced his whole conduct, and to have determined him to accede to the compromise offered by Parker's attorney.

It has been said that an award rendered under these circumstances ought not to bind Holker, unless his own gross negligence may have deprived him of that equity which would otherwise belong to his case.

[*454] * Let his conduct be examined.

He appears to have been strongly impressed with the importance of his personal attendance on the arbitrators. Indeed, it could scarcely be otherwise. Although his judgment against Parker might not be viewed as a nullity, it would certainly be opened, and all the items on which it was founded be liable to exception. His personal explanations would certainly be essential. They would also be essential in encountering the credits which might be claimed by Parker. His personal attendance was impossible.

He appears to have indulged the hope that he might be liberated in time, until the period allowed for appearing before the referees had passed away.

It is true that he ought to have transmitted his papers to his attorneys. The evidence now adduced, or a considerable part of it, might then have been obtained. That he was led to believe Parker insolvent would not be a sufficient excuse for neglecting to do so, unless it could be shown that this impression was made by Parker himself, or by his agents. The evidence to this point does not amount to more than light suspicion.

Yet when it is recollected that the plaintiff was embarrassed and detained by legal process; that he did not possess a clear and distinct knowledge of the testimony which would be required; that some apology for not making an early exertion to obtain that testimony is to be found in the hope he indulged of being enabled by the discharge of his person to attend the referees; that the expectation, that the judgments in the hands of his counsel would be regarded by the referees, ought not to be considered as entirely unfounded; this court is of opinion that it would be too rigid an application of the rule which exacts, from those against whom iniquitous judgments have been obtained, evidence of having done all that was practicable at law, to deny relief in this case.

With the single exception of his omitting to furnish the evidence on which his judgment against Parker was obtained, and to furnish copies of other judgments rendered * against him [*455] as one of the firm of Daniel Parker & Company, as he did in the case of Ross, (of the efficacy of all which if furnished nothing decisive can be said,) no negligence can be imputed to Holker. He has not rested under the decision against him, until Parker, confiding in his security, may have lost the means of protecting himself from an unjust demand, but has pursued him diligently in the courts of France. Finding this award and the judgment thereon to be an insurmountable bar to the examination of his claim in the courts of France, he has without loss of time instituted this suit. Nothing appears in the cause to induce an opinion that the claims of the parties may not now be as fairly and as fully examined as they could have been before the referees in 1799.

Upon a full view of the whole cause, this court is of opinion that the circuit court erred in dismissing the bill of the plaintiffs; and that the decree ought to be reversed and annulled, with directions to set aside the award and the judgment rendered in October, 1799, and to direct an account between the plaintiff Holker, and the defendant.

[*456] *BARNITZ'S LESSEE *v.* ROBERT CASEY.

7 C. 456.

The statute of descents in Maryland has not declared how an intestate estate shall descend, which was derived to the intestate from his half brother, or from his brother of the whole blood, or from his son or daughter, or from his wife; but such estates are left to descend as at common law.

A devise to A. in fee, and if he shall die under the age of twenty-one years, and without issue, then to B. in fee, is a good executory devise; and if B. die before the contingency happen, it devolves upon his heir, and so from heir to heir until the contingency happen, when it vests absolutely in him only who can then make himself heir to B. the executory devisee. And although A. be the heir at law of B., yet the executory devise thus devolving on him, is not merged in the precedent estate, but on the death of A. devolves to the next heir of B. One tenant in common cannot maintain ejectment against his cotenant, without actual ouster.

ERROR to the circuit court for the district of Maryland, in an ejectment brought by the lessee of Barnitz against Casey, to try the title of Barnitz to certain real estate in Baltimore.

The facts of the case were stated by STORY, J., in delivering the opinion of the court, as follows: —

On or about the 6th of February, 1780, Daniel Barnitz died seized of the premises in the declaration mentioned, having, by his will, devised the same to his wife, Catharine Barnitz, in fee, and leaving issue by his said wife, an only child and heir, Elizabeth Barnitz, who intermarried with one Charles M'Connell, by whom she had an only child, John M'Connell; after whose birth, and some time in 1781, Charles M'Connell died. Afterwards, his widow, Elizabeth, intermarried with one John Hammond, by whom she had one child only, John Barnitz Hammond, and died on the 22d of April, 1788. After her death, John Hammond intermarried with Elizabeth Anderson, and died on the 7th of April, 1805, leaving issue by the last marriage, Jane B. Hammond, and Henry Hammond, his heirs at law, who are now alive, under whom the defendant in ejectment claims. On the 7th of April, 1794, Catharine Barnitz died seized of the pre-
[*457] mises, *having first duly made her last will and testament. By that will she devised to the said John M'Connell, in fee, two certain parcels of land. She then devised another parcel of land, including her mansion-house, to the said John Barnitz Hammond, to the intent and uses following, namely, subject (as to the rents thereof) to certain trusts for the maintenance and education of the said John Barnitz Hammond, and for the payment of certain specific debts

of the testratrix. "To the use of John Hammond, the father, for and during the minority of the said John B. Hammond, if he shall so long live, provided the said John Hammond shall maintain, clothe, and educate the said John B. Hammond, out of the rents thereof, during his minority; and from and immediately after the said John B. Hammond shall arrive to the age of twenty one years, or the death of the said John Hammond, his father, which shall first happen," then to the said John B. Hammond, in fee. The testatrix then provides, "and if it should hereafter happen that the said John M'Connell should die before he shall arrive to the age of twenty-one years, and without issue, then I give, devise, and bequeathe all the estate of the said John M'Connell, which is hereby devised to him, to go immediately to the said John B. Hammond, his heirs and assigns forever. And if it should hereafter happen that the said John B. Hammond should die, before he shall arrive to the age of twenty-one years, and without issue, then and in such case, after the payment of my debts as above mentioned, I give, bequeathe, and devise," &c., (the same land and mansion-house before devised to John B. Hammond,) to the said John Hammond, his heirs and assigns forever; and also the residue of estate herein before or after devised to the said John B. Hammond, and not hereby otherwise disposed of, I then, and in such case, give and devise the same to the said John M'Connell, to hold to him, his heirs and assigns forever, from and immediately after the death of the said John B. Hammond, as aforesaid; and in case of the death of both of my grandsons, under age and without issue as aforesaid, then I give, devise, and bequeathe all that part of my estate which I have hereinbefore given to the said John M'Connell, to Charles Barnitz, of," &c., "to hold to him, his heirs and assigns forever."

* The testatrix then provides for the payment of her debts, [*458] by a sale if necessary, of some of her lots of land, on or near Church hill, in Baltimore, and then proceeds: "And I give and devise all the rest and residue of the said lots on or near Church hill aforesaid, and all my estate therein, subject nevertheless to the devises aforesaid, to my said grandsons, John M'Connell and John B. Hammond, their heirs and assigns forever, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants." After some intermediate bequests, the testatrix devises "all the rest, residue, and remainder of her estate, real and personal, to the said John M'Connell and John B. Hammond, their heirs and assigns forever, to be equally divided between them, share and share alike."

John M'Connell attained his full age of twenty-one years, married,

had issue, and afterwards, on the 7th of April, 1802, died without leaving any surviving issue. And John B. Hammond died on the 12th of February, 1808, under the age of twenty-one years, and without issue.

The lessors of the plaintiff are the children and heirs at law of Charles Barnitz, who was the only brother of Daniel Barnitz, the testator. And upon the defect of lineal heirs, the said lessors claim as next heirs, in blood, of John M'Connell, on the part of his mother, Elizabeth Barnitz, the daughter of Daniel Barnitz. It is admitted that the inheritable blood is extinct on the part of Charles M'Connell, the father of John M'Connell.

At the death of John B. Hammond, the property consisted of four descriptions; which it may be proper to enumerate.

1. The land specifically devised to John M'Connell, with a limitation over to John B. Hammond.

2. The land specifically devised to John B. Hammond, with a limitation over in fee to his father.

3. The moiety of the Church hill lots, and the residuary estate devised to John M'Connell, in fee.

[* 459] *4. The moiety of the Church hill lots, and the residuary estate devised to John B. Hammond in fee, with a limitation over to John M'Connell.

At the time of the death of Catharine Barnitz, (as she survived her daughter,) her two grandsons, M'Connell and Hammond, were her heirs at law.

Harper, for the plaintiff.

Martin and *Pinkney*, for the defendant.

[* 464] *Story, J., after stating the facts of the case, delivered the opinion of the court, as follows: —

It is true, that the general rule is, that an heir shall not take by devise, when he may take the same estate in the land by descent. 1 Roll. Abr. 626, l. 30; Hob. 30; 1 Salk. 242; 1 Bl. Rep. 22.

But it is not denied that all the estates which each of the grandsons derived under the will, were estates by purchase. Admitting the executory devises over to be good, there could be no doubt as to any part of the estates; for the estates are of a quality different from what the parties would have taken in the course of descent.

It has been argued by the plaintiff's counsel, upon the foregoing facts, that as to the whole estate immediately devised to John M'Connell, the lessors of the plaintiff are entitled to recover, in the

events which have happened, as his heirs *ex parte materna;* and that as to the estate devised to him upon the contingency of the death of John B. Hammond under age and without issue, the lessors of the plaintiff are entitled to recover as the heirs at law of John M'Connell, at the time when the contingency happened, although not heirs at the time of his death.

*The decision of these points depends upon the true con- [*465]
struction of the statute of descents of Maryland, and the application thereto of the principles of the common law.

This statute of descents, 1786, ch. 45, after reciting that the law of descents which originated with the feudal system and military tenures, is contrary to justice, and ought to be abolished, enacts, "That if any person seized of an estate," &c., "shall die intestate thereof, such lands," &c., "shall descend to the kindred, male and female, of such person, in the following order, to wit: First, to the child or children, and their descendants, if any, equally, and if no child or descendant, and the estate descended to the intestate on the part of the father, then to the father, and if no father living, then to the brothers and sisters of the intestate of the blood of the father, and their descendants equally, and if no brother or sister as aforesaid, or descendant from such brother or sister, then to the grandfather on the part of the father, and if no such grandfather living, then to the descendants of such grandfather and their descendants, in equal degree equally, and if no descendant of such grandfather, then to the father of such grandfather, and if none such living, then to the descendants of the father of such grandfather in equal degree, and so on, passing to the next lineal male paternal ancestor, and if none such, to his descendants in equal degree, without end. And if no paternal ancestor, or descendant from such ancestor, then to the mother of the intestate, and if no mother living, to her descendants in equal degree equally, and if no mother living, or descendants from such mother, then to the maternal ancestors and their descendants in the same manner as is above directed as to the paternal ancestors and their descendants. And if the estate descended to the intestate on the part of the mother, and the intestate shall die without any child or descendant as aforesaid, then the estate shall go to the mother, and if no mother living, then to the brothers and sisters of the intestate of the blood of the mother, and their descendants in equal degree equally, and if no such brother or sister, or descendant of such brother or sister, then to the grandfather on the part of the mother, and if no such grandfather living, then to his descendants in equal degree equally, and if no such *descend- [*466]
ant of such grandfather, then to the father of such grand-

father, and if none such living, then to his descendants in equal degree, and so on, passing to the next male maternal ancestor, and if none such living, to his descendants in equal degree, and if no such maternal ancestor, or descendant from any maternal ancestor, then to the father of the intestate, and if no father living, to his descendants in equal degree equally, and if no father living, or descendant from the father, then to the paternal ancestors and their descendants, in the same manner as is above directed as to the maternal ancestors."

"And if the estate is or shall be vested in the intestate by purchase, and not derived from or through either of his ancestors, and there be no child or descendant of such intestate, then the estate shall descend to the brothers and sisters of such intestate of the whole blood, and their descendants in equal degree equally, and if no brother or sister of the whole blood, or descendant from such brother or sister, then to the brothers and sisters of the half blood and their descendants, in equal degree equally, and if no brother or sister of the whole or half blood, or any descendant from such brother or sister, then to the father, and if no father living, then to the mother, and if no mother living, then to the grandfather on the part of the father, and if no such grandfather living, then to the descendants of such grandfather, in equal degree equally, and if no such grandfather, or any descendant from him, then to the grandfather on the part of the mother, and if no such grandfather, then to his descendants in equal degree equally, and so on without end, alternating the next male paternal ancestor and his descendants, and the next male maternal ancestor and his descendants; and giving preference to the paternal ancestor and his descendants; and if there be no descendants or kindred of the intestate as aforesaid to take the estate, then the same shall go to the husband or wife, as the case may be; and if the husband or wife be dead, then to his or her kindred in the like course as if such husband or wife had survived the intestate, and then had died entitled to the estate by purchase; and if the intestate has had more husbands or wives than one, and all shall die before such intestate, then the estate shall be equally divided among the kindred of the several husbands or wives in equal degree equally."

[*467] *Three classes of cases are here in terms provided for.

1. "Estates descended to the intestate on the part of the father."

2. "Estates descended to the intestate on the part of the mother."

3. "Estates vested in the intestate by purchase, and not derived from or through either of his ancestors."

The case of a *propositus* dying seized of an estate which descended to him from his brother who had taken the same by purchase or by

descent not *ex parte paterna* or *materna*; and the case of a *propositus* dying seized of an estate which descended to him from his own child who had taken the same by purchase or by a like descent; are not directly within the language of the statute. For, by the common law, a descent from brother to brother is held to be an immediate descent, and not from or through the parents; and the express provision of the statute of Maryland as to estates of purchase, necessarily involves the same conclusion; and the same may be declared of a descent from a child to a parent under the same statute.

It has been argued that the legislature intended to form a complete scheme of descents; and that the court ought not to construe any case to be a *casus omissus*, if by any reasonable construction the words can be extended to embrace it. Both parties accede to this argument, but they apply it in a very different manner. The plaintiffs contend, that the descent from brother to brother was meant to be included in the first and second classes of descents, as the parents were the common link of connection, from and through whom the consanguinity was to be sought; that therefore the descent, in such case, is *ex parte paterna*, or *materna*, as the father or mother happens to be the *commune vinculum*. And the plaintiffs rely on the words, "and not derived from or through either of his ancestors," in the clause embracing the third class, as distinctly showing that the legislature deemed every case of descents to be completely within the preceding classes. On the other hand, the defendants contend that, whatever might be the legislative supposition, it is impossible to support the position, that a descent from brother to brother, or from child to parent, is a descent *ex parte paterna* or *materna*. *It is [*468] therefore, either a *casus omissus*, or the words "and not derived from or through either of his ancestors" are to be considered not as qualifying and limiting the preceding words, but as either constituting a fourth class of cases, embracing all such as are not included in the three preceding classes; or as explaining estates by purchase to include all cases which are not paternal or maternal descents.

There are certainly intrinsic difficulties in admitting either of these constructions. If the legislature have proceeded on a mistake, it would be dangerous to declare that a court of law were bound to enlarge the natural import of words in order to supply deficiencies occasioned by that mistake. It would be still more dangerous to admit that, because the legislature have expressed an intention to form a scheme of descents, the court were bound to bring every case within the specified classes. In the present case, equal violence would be done to the ordinary use of the terms employed by adopting the construction contended for by either party.

It is not a descent from or through the paternal or maternal line, in the sense of the common law. Nor is it a purchase.

The words "and not derived from or through either of his ancestors" are manifestly used as explanatory of the legal import of purchase. They are the exact words which the common law selects to distinguish the estate of a purchaser from the estate of an heir.

It is obvious that the legislature use the words descent and purchase in their technical and legal sense. They have also expressly provided for the case of a descent from brother to brother, passing by the parents; and from a child to a parent, when there are no brothers or sisters. These descents must, therefore, be direct and immediate; and the former case is so deemed also at the common law. It is, therefore, in our judgment perfectly clear, that a descent from brother to brother is not within the statute, and of course is a *casus omissus*, to be regulated by the common law.

To apply this to the present case. By the arrival of John [*469] M'Connell at the age of 21 years, all the estates *devised to him immediately became absolute estates in fee simple. On his death they passed to his half brother, John B. Hammond; and upon his death they passed to the heirs-at-law of the latter. The lessors of the plaintiff have, therefore, made no sufficient title thereto.

Let us now consider the second question: whether the lessors of the plaintiff have any title to the estates which were devised over to John M'Connell upon the contingency of John B. Hammond's dying under age and without issue.

It has been argued by the defendant's counsel, that this executory devise is void, because the contingency is too remote.

It is the acknowledged rule, that an executory devise is not too remote if the contingency may happen within a life or lives in being, or 21 years and a few months after.

In the present case, the contingency must have happened within 21 years at all events. For if John B. Hammond attained his full age, the estate vested absolutely. To have defeated the estate over, it was sufficient either that he attained his full age, or died under age, leaving issue. The authorities are conclusive on this point. 1 Wils. 140, 270; 2 Burr, 873; 1 Taunt. 174; 5 Bos. & Pul. 38; 12 East. 288; 2 Str. 1175. There is no validity, therefore, in this objection.

In the next place, it will be necessary to consider what is the nature of an executory devise as to its transmissibility to heirs, where the devisee dies before the happening of the contingency.

And it seems very clear that, at common law, contingent remainders and executory devises are transmissible to the heirs of the party

to whom they are limited, if he chance to die before the contingency happens. Pollexfen, 54; 1 Rep. 99; Cas. Temp. Talb. 117. In such case, however, it does not vest absolutely in the first heir, so as upon his death to carry it to his heir-at-law, who is not heir-at-law of the first devisee, but it devolves from heir to heir, and vests absolutely in him only who can make himself heir to the first devisee at *the time when the contingency happens, and the executory devise falls into possession. [*470]

This rule is adopted in analogy to that rule of descent, which requires that a person who claims a fee simple, by descent, from one who was first purchaser of the reversion or remainder expectant on a freehold estate, must make himself heir of such purchaser at the time when that reversion or remainder falls into possession. Co. Lit. 11, (b.) 14, (a.); 3 Rep. 42. Nor does it vary the legal result, that the person to whom the preceding estate is devised, happens to be the heir of the executory devisee, for though on the death of the latter the executory devise devolves upon him, yet it is not merged in the preceding estate, but expects the regular happening of the contingency, and then vests absolutely in the then heir of the executory devisee. The case of Goodright *v.* Searle, 2 Wils. 29, is decisive on this point, and indeed runs on all fours with the present.

But it is contended, that the statute of descents of Maryland has changed the rule of the common law in this respect; and has made the death of the intestate the point of time from which the descent and heirship are in every case to be traced. The third section, which is relied on for this purpose, enacts as follows: "That no right in the inheritance shall accrue to or vest in any person, other than to children of the intestate and their descendants, unless such person is in being, and capable in law to take as heir at the time of the intestate's death; but any child or descendant of the intestate, born after the death of the intestate, shall have the same right of inheritance as if born before the death of the intestate."

In our judgment, the conclusion drawn from this clause is not correct. The object of the section is to limit the natural capacity to take, as heirs, to persons in being at the time of the death of the intestate, where the estate is then capable of vesting in possession; and not to make persons heirs, who, if in being at the time, would not, by the common law, answer the description of absolute heirs, or to give a vested absolute interest, where the common law had given only a possible contingent interest. The legislature had in view cases of *posthumous children, and cases where a [*471] descent to an heir had been defeated by the subsequent birth of a nearer heir. The argument of the defendants, on this point,

ought not, therefore, to prevail. No question has been made as to the land specifically devised to John B. Hammond in fee, with a limitation over to his father in fee. As that limitation over was a good executory devise, and, in the events which happened, took effect, it is very clear that the lessors of the plaintiff cannot claim title thereto. This is, indeed, conceded on all sides.

The result of this opinion accordingly is, that the lessors of the plaintiff are entitled, as heirs of John M'Connell, at the happening of the contingency, on the death of John B. Hammond, under age, and without issue, to one moiety of the Church hill lands, and the residuary estates as tenants in common with the heirs of John B. Hammond; but they are not entitled to any portion of the lands of which John M'Connell had an absolute vested fee at the time of his decease.

As, however, a tenant in common cannot in general maintain an action of ejectment against his cotenant, and there are no facts found in this case to prove an actual ouster and to take it out of the general rule, the consequence is that the judgment, in the opinion of a majority of the court, must be affirmed, with costs.

16 H. 275.

Blackwell *v.* Patton and Erwin's Lessee.

7 C. 471.

The admission of a deed to be registered, does not preclude an examination into the evidence upon which it was admitted; and if found not to conform to the requisitions of law the registration is void. An error, which could not have injured the plaintiff in error, is not cause for reversing a judgment.

Under the act of the State of Tennessee, of November 23, 1809, a deed, proved by one of the subscribing witnesses before a judge of a court of another State, where the grantor resided and made the deed, and registered in the county where the land lay, was valid. It is not error to allow an amendment of the date of the demise in a declaration in ejectment.

Under the laws of North Carolina the first grant under a duplicate warrant was valid.

Error to the circuit court of the United States for the district of Tennessee. The substance of the exceptions taken in that court, and the material facts, appear in the opinion of the court.

Martin, for the plaintiff.

Campbell, for the defendant.

* MARSHALL, C. J., delivered the opinion of the court, as [*475] follows:—

The writ of error in this case is brought to reverse a judgment obtained by the defendants in error against the plaintiffs in an ejectment brought in the circuit court of West Tennessee. At the trial, the plaintiffs in that court offered in evidence, in order to make out their title, a deed, bearing date the 9th of October, 1794, from J. G. Blount and Thomas Blount, of North Carolina, to David Allison, of Philadelphia, which deed was recorded in the county in which the lands lie, on the 28th day of December, 1808. The defendants objected to the admission of this deed, and excepted to the opinion of the court overruling the objection.

The original law requiring the enregistering of deeds, passed in North Carolina (then comprehending what is now the State of Tennessee) in the year 1715. This act requires that the deed shall be acknowledged by the vendor, or proved by one or more evidences upon oath, either before the chief justice for the time being, or in the court of the precinct where the land lies, and registered by the public register of the precinct where the land lies, within twelve months after the date thereof. It was afterwards enacted, that the deed might be registered by the clerk of the county in which the land lies, and the time for the registration of deeds was prolonged until Tennessee was erected into an independent State, after which the time for enregistering of deeds continued to be prolonged by the legislature of that State.

In the year 1797, the legislature of Tennessee enacted a law, declaring that deeds made without the limits of the State, should be admitted to registration on proof that the same was acknowledged by the grantor, or proved by one or more of the subscribing witnesses in open court, in some one of the courts of the United States, and on no other proof whatever, except where the party holding such deed shall have the same proved * or acknowledged [*476] within the limits of the State of Tennessee, agreeable to the mode heretofore in force and use in that State.

It is contended by the counsel for the defendants in error, that the deed being recorded in the proper county, the judgment of a competent court has been given on the sufficiency of the testimony on which it was registered, and that judgment is not examinable in any other tribunal. But this court is not of that opinion. The proof on which a deed shall be registered is prescribed by law, and it is enacted that the deed shall not be good and available in law, unless it be so proved and recorded. The evidence therefore is spread upon the record, and is always attainable. The order that a deed should be admitted to record is an *ex parte* order, and might often be obtained improperly

if the order was conclusive. It is believed to be the practice of all courts, where the law directs conveyances to be recorded, and prescribes the testimony on which they shall be recorded, in terms similar to those employed in the act of North Carolina, to hold themselves at liberty to examine the proof on which the registration has been made.

This deed in the present case was proved before Judge Haywood, in North Carolina, by one of the subscribing witnesses thereto, on the 29th of September, 1797, and registered in Stoke's county, in North Carolina.

On the 9th day of December, 1807, the handwriting of the subscribing witnesses, who were dead, and of the grantors, was proved before Samuel Powell, one of the judges of the supreme court of law and equity, in the State of Tennessee, who thereupon ordered the deed to be registered; and afterwards, in November term, 1808, the same proof was received in open court in the county where the lands lie, and was ordered to be registered by that court, which order was executed.

This court is of opinion that the deed was not sufficiently proved according to the then existing law. The probate before Judge Haywood was not sufficient to prove it as a deed made out of the State, because the act of 1797, required that such probate should be [*477] made in open * court. The proof made before Judge Powell, and in open court, is insufficient, because it was not made by a subscribing witness.

On the 23d of November, 1809, the legislature of Tennessee passed an act, declaring that all deeds for land within the State, made out of the State by grantors residing without the State, and "which shall have been proven by one or more of the subscribing witnesses thereto, or acknowledged by the grantor or grantors before any judge of any court in another State, or before the mayor, &c., and shall have been registered in this State in the county where the land, or any part thereof lies, within the time required by law for registering the same, such probate and registration shall be good and sufficient to entitle the same to be read in evidence in any court within this State."

This act appears to the court to cover the precise case. This was a deed for land lying within the State of Tennessee, made out of the State by grantors residing without the State, which had been proven by one of the subscribing witnesses thereto before a judge of a court of another State, and had been registered in the county where the land lay within the time required by law for registering the same.

This act gave complete validity to the registration made in De-

cember, 1808, and entitled the deed to be read in evidence. It looked back, in order to affirm and legalize certain registrations made on probates which did not satisfy the laws existing at the time, but which the legislature deemed sufficient for the future.

In tracing his title, the plaintiff in the circuit court gave in evidence a deed to himself which bore date posterior in point of time to the demise laid in the declaration of ejectment. The defendant, on this account, objected to the deeds going in evidence to the jury, but the court overruled the objection, and declared the date of the lease to be immaterial, and that it should be overlooked, or the plaintiff have leave to amend. The declaration was amended by striking out the date of the lease mentioned in the declaration, and inserting a date posterior to the conveyance made to the plaintiff.

* In an ejectment, the lease is entirely a fiction invented [*478] for the purpose of going fairly to trial on the title. Courts have exercised a full discretion in allowing it to be amended. A plaintiff has frequently been allowed to enlarge the term when it has expired before a final decision of the cause. Between making the term extend to a more distant day, and commence at a later day, the court can perceive no difference in substance. They are modifications of the same power intended to effect the same object; and although not precisely the same in form, the one is not greater in degree than the other. The amendment, therefore, was properly allowed.

Although this court is of opinion that the circuit court erred, in saying that it was unnecessary to prove a title in the lessor of the plaintiff at the date of the demise laid in the declaration, yet it is an error which could not injure the defendants, or in any manner affect the cause. The amendment being allowed, the question whether the deed could have been read in evidence had the amendment not been made becomes wholly immaterial, and this court will not notice it.

For the purpose of showing that the original grant was void, the defendant then offered evidence to prove that it was founded on a duplicate warrant issued by John Armstrong, entry-taker of western lands for the State of North Carolina, in the year 1793, the original warrant being still in the hands of the surveyor-general of the middle district within which the original entry was situated; and that the grantees, after the said grant was issued, obtained the original warrant from the surveyor-general, and procured another grant founded thereon for other lands. To the admission of this testimony, the plaintiff objected, and the court sustained the objection. To this opinion also an exception was taken.

By the laws of North Carolina, under which this entry was made, any citizen was permitted to enter with the entry-taker any quantity of land

not exceeding 5,000 acres, which it was his duty to describe specifically. After the expiration of three months the entry-taker was to give him a copy of the entry, with a warrant to the surveyor to survey [*479] the land. As no other *land than that described could be surveyed under this entry and warrant, while the land really entered remained vacant, it was entirely unimportant whether the survey was made under the first or a second copy of the entry. If indeed two persons claimed the same land, under different surveys and grants, the elder patentee would of course hold the land at law. But no person other than such subsequent patentee, or one claiming under him, could contest the elder grant. To the State, and to all the world, it was perfectly immaterial when this grant issued, whether it emanated on the first copy of the entry, or on any other copy, as no other use had then been made of the first copy, and this grant was unimpeachable.

In 1784, a power was given to remove entries when they were made on lands previously granted or entered. But certainly this would not extend to the removal of an entry, and the survey of other lands on a copy thereof, which entry had already been executed and carried into grant, either on the first or on any other copy. The face of the grant gave no notice that it had issued on a second copy of the entry, and as the case was not provided for by law, it is not improbable that every copy given by the entry-taker would bear the same appearance. There was nothing which would indicate to a purchaser that some future fraud might possibly be practised whereby another grant might be obtained, and which might caution him, that a title, good to every appearance, was infected by a circumstance into which the law did not expect him to inquire. Had no subsequent patent issued in this case for other lands, it would not be contended that this patent was either void or voidable, and it is perfectly clear that a patent which was valid when issued, never can be avoided in the hands of a fair purchaser, by a subsequent fraud committed by the original patentee. It is the subsequent patent which injures the State, and which is obtained by fraud. It is the subsequent patent, if either, the validity of which is questionable.

In the year 1795, an act passed directing the books of entry-takers to be delivered to the clerks of the several county courts in which such entry-takers respectively resided; and in 1796, an act was [*480] passed prescribing the *manner in which duplicates might be obtained, where the warrants were lost, and others had not been issued, while the books remained with the entry-takers.

It is strongly to be inferred, not only from the language of this act, but from the circumstance that no provision is made for duplicates

to be issued by the entry-taker in future cases of lost warrants, that, every copy of an entry which was granted by the entry-taker, was considered as an original, and as an equal authority to the surveyor to survey the land entered. The entry being once executed, it was his duty not to execute it again.

This act provides, that where duplicates shall issue from the clerk, by order of the court, the surveyor shall note the fact in his plat, and it shall appear on the face of the grant, that the same is issued on a duplicate, and shall be liable to become null and void, if it shall appear that a grant had been obtained on the original warrant.

This act applies only to grants issued on duplicates obtained in conformity with its provisions, and would seem to respect only the junior patent. It cannot affect the grant in this case, which was issued before its passage. But it affords strong reason for the opinion, that the State of North Carolina did not purpose to impeach its own grants, unless they conveyed notice to the world that they were impeachable, and even then they were voidable, not void. An individual not claiming under the same entry, could not avail himself of their liability to be avoided.

It is the opinion of the court that there is no error, and that the judgment be affirmed.

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* MILLS *v.* DURYEE. [*481]

7 C. 481.

Nil debet is not a good plea to an action founded on a judgment of another State.

ERROR to the circuit court for the District of Columbia, in an action of debt upon a judgment of the supreme court of the State of New York, to which the defendant below pleaded *nil debet*, which plea, upon general demurrer, was adjudged bad.

F. S. Key, for the plaintiff.

Jones, for the defendant.

* STORY, J., delivered the opinion of the court, as fol- [*483] lows:—

The question in this case is whether *nil debet* is a good plea to an action of debt brought in the courts of this district on a judgment rendered in a court of record of the State of New York, one of the United States.

The decision of this question depends altogether upon the construction of the constitution and laws of the United States.

By the constitution it is declared that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State; and the congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof."

By the act of 26th May, 1790,[1] c. 11, congress provided for the mode of authenticating the records and judicial proceedings of the state courts, and then further declared that: "the records and judicial proceedings, authenticated as aforesaid, shall have such faith and credit given to them in every court within the United [*484] States as they have by law or usage in the courts of *the State from whence the said records are or shall be taken."

It is argued that this act provides only for the admission of such records as evidence, but does not declare the effect of such evidence when admitted. This argument cannot be supported. The act declares that the record duly authenticated shall have such faith and credit as it has in the state court from whence it is taken. If in such court it has the faith and credit of evidence of the highest nature, namely, record evidence, it must have the same faith and credit in every other court. Congress have therefore declared the effect of the record by declaring what faith and credit shall be given to it.

It remains only then to inquire in every case what is the effect of a judgment in the State where it is rendered. In the present case the defendant had full notice of the suit, for he was arrested and gave bail, and it is beyond all doubt that the judgment of the supreme court of New York was conclusive upon the parties in that State. It must, therefore, be conclusive here also.

But it is said that admitting that the judgment is conclusive, still *nil debet* was a good plea; and *nul tiel record* could not be pleaded, because the record was of another State, and could not be inspected or transmitted by *certiorari*. Whatever may be the validity of the plea of *nil debet* after verdict, it cannot be sustained in this case. The pleadings in an action are governed by the dignity of the instrument on which it is founded. If it be a record, conclusive between the parties, it cannot be denied but by the plea of *nul tiel record;* and when congress gave the effect of a record to the judgment it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed by the act, and

[1] 1 Stats. at Large, 122.

such proof is of as high a nature as an inspection, by the court, of its own record, or as an exemplification would be in any other court of the same State. Had this judgment been sued in any other court of New York, there is no doubt that *nil debet* would have been an inadmissible plea. Yet the same objection might be urged that the record could not be inspected. The law, however, is undoubted *that an exemplification would in such case be [*485] decisive. The original need not be produced.

Another objection is, that the act cannot have the effect contended for, because it does not enable the courts of another State to issue executions directly on the original judgment. This objection, if it were valid, would equally apply to every other court of the same State where the judgment was rendered. But it has no foundation. The right of a court to issue execution depends upon its own powers and organization. Its judgments may be complete and perfect, and have full effect, independent of the right to issue execution.

The last objection is, that the act does not apply to courts of this district. The words of the act afford a decisive answer, for they extend "to every court within the United States."

Were the construction contended for by the plaintiff in error to prevail, that judgments of the state courts ought to be considered *primâ facie* evidence only, this clause in the constitution would be utterly unimportant and illusory. The common law would give such judgments precisely the same effect. It is manifest, however, that the constitution contemplated a power in congress to give a conclusive effect to such judgments. And we can perceive no rational interpretation of the act of congress, unless it declares a judgment conclusive when a court of the particular State where it is rendered would pronounce the same decision.

On the whole, the opinion of a majority of the court is that the judgment be affirmed, with costs.

JOHNSON, J. In this case, I am unfortunate enough to dissent from my brethren.

I cannot bring my mind to depart from the canons of the common law, especially the law of pleading, without the most urgent necessity. In this case I see none.

A judgment of an independent unconnected jurisdiction *is what the law calls a foreign judgment, and it is every [*486] where acknowledged that *nil debet* is the proper plea to such a judgment. *Nul tiel record* is the proper plea only when the judgment derives its origin from the same source of power with the court before which the action on the former judgment is instituted.

The former concludes to the country, the latter to the court, and is triable only by inspection.

If a different decision were necessary to give effect to the 1st section of the 4th article of the constitution, and the act of 26th May, 1790, I should not hesitate to yield to that necessity. But no such necessity exists; for by receiving the record of the state court properly authenticated as conclusive evidence of the debt, full effect is given to the constitution and the law. And such appears, from the terms made use of by the legislature, to have been their idea of the course to be pursued in the prosecution of the suit upon such a judgment. For faith and credit are terms strictly applicable to evidence.

I am induced to vary in deciding on this question from an apprehension that receiving the plea of *nul tiel record* may at some future time involve this court in inextricable difficulty. In the case of Holker and Parker, which we had before us this term, 7 C. 436, we see an instance in which a judgment for $150,000 was given in Pennsylvania upon an attachment levied on a cask of wine, and debt brought on that judgment in the State of Massachusetts. Now if in this action *nul tiel record* must necessarily be pleaded, it would be difficult to find a method by which the enforcing of such a judgment could be avoided. Instead of promoting, then, the object of the constitution by removing all cause for state jealousies, nothing could tend more to enforce them than enforcing such a judgment. There are certain eternal principles of justice which never ought to be dispensed with, and which courts of justice never can dispense with but when compelled by positive statute. One of those is, that jurisdiction cannot be justly exercised by a State over property not within the reach of its process, or over persons not owing them allegiance, or not subjected to their jurisdiction by being found within their limits.

But if the States are at liberty to pass the most absurd laws [*487] on this subject, and we * admit of a course of pleading which puts it out of our power to prevent the execution of judgments obtained under those laws, certainly an effect will be given to that article of the constitution in direct hostility with the object of it.

I will not now undertake to decide, nor does this case require it, how far the courts of the United States would be bound to carry into effect such judgments; but I am unwilling to be precluded, by a technical nicetv from exercising our judgment at all upon such cases.

3 W. 234; 13 P. 312; 1 H. 165

Oliver v. The Maryland Insurance Company.

7 C. 487.

If insurance be made at and from A to B, and at and from B back to A, unnecessary delay at B is a deviation.

What delay is unnecessary, must depend on the circumstances of each case, and not upon a usage of the port; but the latter may be evidence of what was necessary.

If the vessel remain at B long enough to take a cargo, and then sail without cargo for C, where it is usual to touch, and there remain and take a cargo, this is a deviation, unless the delay was in conformity with a usage to wait at B to have a cargo collected at C.

Even extraordinary indefinite danger of capture, will not justify delay at a port. The danger must be obvious and immediate in reference to the situation of the ship at the particular time.

Error to the circuit court for the district of Maryland. The case arose upon a policy of insurance on The Snow Comet, "at and from Baltimore to Barcelona, and at and from Barcelona back to Baltimore."

The substance of the exceptions taken in that court is stated in the opinions of the judges.

Harper, for the plaintiff.

Martin and *Pinkney*, for the defendant.

*Marshall, C. J., delivered the opinion of the court, as [*489] follows: —

This was an action brought on a policy insuring The Snow Comet, at and from Baltimore to Barcelona, and at and from thence back to Baltimore. The Comet arrived at Barcelona on the 25th day of July, in the year 1807, where she was compelled to perform quarantine. On the 28th of November The Comet cleared out from Barcelona for Salou, a port of Catalonia, about sixty miles south of Barcelona, where her return cargo was ready to be taken on board. On the 1st of December, when in the act of sailing, the officers of the vessel were informed that the Algerine cruisers were out capturing American vessels. They were advised to remain until they received further information. On the 8th day of January, 1808, they sailed for Salou and arrived on the 10th. They were detained by high winds till the 28th of January, when they sailed for Baltimore. On the 5th of February the vessel was captured by a British cruiser, while on her return voyage, and carried into Gibraltar, where she was condemned under the orders of council of the 8th of November

1807. Evidence was given that it was usual for vessels trading to Barcelona to touch at Salou or some other port on the same coast, to take in the whole or part of their return cargo, and that in some instances vessels had remained in the port of Barcelona four, six, and even eight months, waiting for a return cargo.

On this evidence the counsel for the defendants moved the court to instruct the jury that the plaintiff could not recover in this cause, by reason of the length of time the vessel remained at Barcelona. The court refused to give the direction as prayed, but did instruct the jury that, if they believed the facts stated, the plaintiff [* 490] was not entitled to recover unless from the whole *testimony in the cause they should be of opinion that the vessel did not remain longer at Barcelona than the usage and custom of trade at that place rendered necessary to complete her cargo. To this direction of the court the plaintiff, by his counsel, excepted.

This exception was not much pressed at the bar, nor does it appear to this court to contain any principle to which he could rightly object.

Unquestionably an idle waste of time, after a vessel has completed the purposes for which she entered a port, is a deviation which discharges the underwriters. If The Comet remained without excuse, at Barcelona, an unnecessary length of time while her cargo was ready for her, and she might have sailed, she would remain at the risk of the owners — not of the underwriters.

There is, however, some doubt spread over the opinion in this case in consequence of the terms in which it is expressed. The vessel might certainly remain as long as was necessary to complete her cargo, but it is scarcely to be supposed that this was regulated by usage and custom. The usages and customs of a port or of a trade are peculiar to the port or trade. But the necessity of waiting where a cargo is to be taken on board until it can be obtained, is common to all ports and to all trades. The length of time frequently employed in selling one cargo and procuring another may assist in proving that a particular vessel has or has not practised unnecessary delays in port, but can establish no usage by which the time of remaining in port is fixed. The substantial part of the opinion, however, appears to have been, and seems to have been understood, that the plaintiff could not recover, unless the jury should be of opinion that the vessel did not remain longer at Barcelona than was necessary to complete her cargo, of which necessity the time usually employed for that purpose might be considered as evidence.

The defendants then moved the court to instruct the jury, that if the said vessel continued at Barcelona as long as was justifiable, by the usage of trade at that place for completing and taking in her

cargo, and did not complete and take in her cargo there, but afterwards *went to Salou and remained there the [*491] length of time as stated in the said protest, in such case the plaintiff is not entitled to recover.

The court instructed the jury that if the vessel remained at Barcelona as long as the usage of trade justified for the purpose of taking in a cargo there, that she could not afterwards go to another port and take it in without vacating the policy.

To this opinion also the counsel for the plaintiff excepted. Upon this exception there was some difference of opinion in this court. For myself, I considered the direction as attaching the departure, which would avoid the contract, to the act of sailing to and continuing in Salou for the purpose of completing her return voyage, and am of opinion that although The Comet might have remained at Barcelona long enough to have taken in a return cargo there, for which she might or might not be blamable, yet that no additional fault was committed by touching at Salou for the purpose of completing her cargo, if to touch at Salou for that purpose was the usage of the trade.

A majority of the court, however, is of a different opinion. The usage to stay at Barcelona for a return cargo, and to touch at Salou for a return cargo, as disclosed in the plaintiff's evidence, are considered by them not as independent but as auxiliary usages which are to be taken in connection in ascertaining whether there was or was not unreasonable delay in the conduct of the voyage. The assured had a right, under these usages as they are called, to take in part of the cargo at Barcelona and part at Salou, or the whole at either port. The delay necessary for these purposes would be justifiable at either port; but if the assured exhausted the whole time at one port, which, according to the usage, was allowable only for the purpose of taking in the whole cargo, the subsequent delay at another port, for the purpose of taking in the cargo, must be considered as unreasonable. The delay at Barcelona, under such circumstances, could not be necessary for the purposes of the voyage, and therefore would determine the policy. But the deviation would rest merely in intention, until the time of sailing for Salou, for until that *time the assured [*492] would have a right to lade his cargo at Barcelona, and thus retroactively justify his stay there under the usage. The delay could not be a consummated deviation until the whole time allowed by the usage was exhausted, and the party had definitively abandoned the lading of a cargo which would justify that delay. The opinion of the court below appears to the majority of this court to have proceeded on this ground, and to be correct.

The plaintiff then, in addition to the former testimony, gave evidence that it was usual for vessels to remain at Barcelona until their return cargoes, or so much thereof as might be necessary for their completion, was provided and collected at Salou, or some other southern port in Catalonia, and then to sail to such port, for the purpose of taking in the cargoes so collected.

The defendants then moved the court to instruct the jury that since it appeared from the protest of the master and others on board The Comet, and from the sentence of condemnation produced by the plaintiff, that all the return cargo, which the said vessel took in at Barcelona, was taken in on or before the 28th of November, that the said vessel was then ready for sea, and was actually cleared out on the 1st of December; and that being there, and about to sail immediately for Salou, the said Snow Comet, in consequence of a report that the Algerine cruisers were out cruising in the Mediterranean against American vessels, remained at Barcelona until the 8th of January, 1808, before she sailed from Barcelona, if the jury believed these facts, the plaintiff could not recover. This opinion was given by the court, and the plaintiff excepted to it.

Had not the testimony on which this application was founded been spread upon the record, the court would have found some difficulty in deciding on the propriety of the opinion which was given from the terms employed in stating the application to the circuit court. It appears, however, from a comparison of the application to the court with the testimony on which it was founded, to have been intended to obtain from the court the opinion that the testimony respecting the report that the Algerines were out capturing American ves-
[*493] sels was * not a sufficient justification for remaining at Barcelona from the 1st of December, 1807, till the 8th of January, 1808.

No doubt is entertained that the danger of capture from the Algerines, if proved to be real and immediate, would justify the continuance in the port of Barcelona.

And the apprehension of such danger, if founded on reasonable evidence, would produce a like effect. But in each case the danger must not be a mere general danger, indefinite in its application and locality. If it were so, in time of war, any delay, however long, in a port, would become excusable, for there would always be danger of capture from the enemy's cruisers. Nor is it sufficient that the danger should be extraordinary, for then any considerable increase of the general risk would authorize a similar delay. The danger, therefore, must be obvious and immediate in reference to the situation of the ship at the particular time. It must be such as is then directly

applied to the interruption of the voyage, and imminent; not such as is merely distant, contingent, and indefinite. In the present case, it is not shown that there was any danger in proceeding from Barcelona to Salou. No Algerine force is shown to be interposed between those ports. Whatever might be the danger elsewhere, if there was none in proceeding to and remaining in Salou, it was the duty of the captain to have proceeded to that place, taken in his cargo, and remained there for further information. The captain was bound to have gone as far on his voyage as he could consistent with the general safety.

The judgment affirmed, with costs.

LIVINGSTON, J. I concur in the opinion that the judgment of the circuit court be affirmed; but in coming to this result I have thought it necessary to examine only the fourth exception which was taken below. It is, according to my view of this cause, very immaterial to inquire whether the plaintiffs succeeded in establishing the usage, as it has been incorrectly termed, for a vessel to remain several months at Barcelona for the purpose of *obtaining a return [*494] cargo; or whether at one period the master of The Comet entertained a well-grounded apprehension of danger of capture by British vessels; or whether it was the course and usage of the trade for vessels bound from Barcelona to any foreign ports to touch at Salou, or at some other port south of Barcelona, on the coast of Catalonia, in order to take in their return cargoes; I say, whether these facts were established, or what opinion the court gave on them in the course of the trial, are in my judgment, as this case comes up, totally irrelevant in the decision of it, because there are other facts proved, and that by the plaintiffs themselves, which are, in the opinion of the whole court, fatal to their claims. The facts are these: "That after all fear from British cruisers had ceased, to wit, on the 28th of November, 1807, being ready for sea, the vessel cleared for Salou on the 1st day of December following, and when in the act of sailing, information was received that the Algerine cruisers were out capturing American vessels; the master was therefore advised to remain in port until they received other intelligence, and did not sail for Salou until the 8th of January, 1808."

On this evidence the circuit court instructed the jury, that if they believed these facts to be true, the plaintiffs were not entitled to recover. In giving this opinion, the court, in effect said, that the information which was received at Barcelona respecting the Algerine cruisers, did not justify a stay there from the 28th of November to the 8th of January.

To this opinion two objections are made.

The one is, that the court took upon itself to decide whether the delay last mentioned proceeded from a justifiable cause, instead of leaving it to the jury to determine both the law and the fact. In doing so, I think the court committed no error. What will excuse a delay, apparently unreasonable, so as to repel the charge of a deviation on that account, must ever be and ought to be a question of law, to be decided by a court under all the circumstances of the particular case. In this way only can any thing like certainty be attained; but if it be left to a jury not only to find the facts, [*495] which is *exclusively within their province, but also to pronounce what is the law resulting from them, it will be next to impossible to form a system of rules by which a merchant may safely regulate his conduct. Nor will it help the matter to consider it as a mixed question of law and fact, because that gives to the jury a right to disregard the opinion of the court, which they will have no right to do in case it be considered exclusively as a question of law on which the court alone has a right to decide. In civil cases, every man has an interest in confining a jury as much as possible to their proper sphere, which is to decide on facts; while a court does not encroach on their province, care should be taken not to encourage any improper encroachment on their part by unnecessarily throwing on them any exercise of what are the legitimate functions of a court. Among these none appear to me to be better settled, than that it is the exclusive privilege and bounden duty of a court to decide whether an act, which is to be done within a reasonable time to entitle a party to maintain his action, has been performed within such time or not. So also, where a party sets up an excuse for an act which will otherwise defeat his right to recover, it appertains exclusively to the court to decide on the sufficiency of the matter alleged, and if a jury, after deciding on the facts, take upon themselves the further office of determining the legal effect thereof as to the case under consideration, in opposition to the declared opinion of the court, they forget their duty, and act contrary to law.

But if this be a question of law, the plaintiff still supposes that the circuit court erred in not thinking that the facts proved constituted a valid excuse for the last forty days' stay at Barcelona, and in not instructing the jury accordingly. This excuse was, in my opinion, properly disposed of by the judge below, but instead of stating at length why I consider the alleged apprehension of capture by the Algerines as furnishing no justification for this delay, it is sufficient to say that I entirely concur, not only in the opinion which has already been delivered on this point, but in the whole of the reasoning on which it is founded.

STORY, J., concurred with Judge Livingston.

*MARSHALL, C. J. My own opinion was that the jury [*496] was to find the fact whether there was danger in passing between Barcelona and Salou; and that they ought to have been instructed that if there was danger it justified the delay, otherwise not.

12 W. 383.

Brig CAROLINE, WILLIAM BROADFOOT, Claimant, v. THE UNITED STATES.

7 C. 496.

A libel for a forfeiture must be particular and certain in all the material circumstances which constitute the offence.

If a sentence of forfeiture be reversed for a defective libel, the cause will be remanded to the circuit court, with directions to allow an amendment.

ERROR to the circuit court for the district of South Carolina, in a case of seizure for violation of the acts of congress respecting the slave-trade.

The libel was in the words following:—

"At a special district court for South Carolina district, Be it remembered, That on the day of in the year of our Lord one thousand eight hundred and the United States of America, by Thomas Parker, their attorney for the district aforesaid, came here into court and gave Thomas Bee, Esq., judge of the said court, to understand and be informed that on the day of they, the said United States, by their proper officers of the customs, did cause to be seized, arrested, and secured, a certain brig or vessel called The Caroline, her tackle, furniture, apparel, and other appurtenances, as forfeited to them, the said United States; for that the said brig or vessel, since the 22d day of March, 1794, was built, fitted, equipped, loaded, or otherwise prepared within a port or place of the said United States, or caused to sail from a port or place of the said United States, by a citizen or citizens of the said United States, or a foreigner, or other persons coming into, or residing in the same, either as master, factor, or owner of the said brig or vessel, for the purpose of carrying on trade or traffic in slaves to a foreign country; and also for that the said brig or vessel, since the day and year last aforesaid, *was built, equipped, loaded, or [*497] otherwise prepared within a port or place of the said United

States, or caused to sail from a port or place within the said United States, by a citizen or citizens of the said United States, or a foreigner or other persons coming into or residing within the same, either as factor, master, or owner of the said brig or vessel, for the purpose of procuring from a foreign kingdom, place, or country, the inhabitants of such kingdom, place, or country, to be transported into a foreign place or country, port or place, to be disposed of and sold as slaves, in violation of a certain act of congress of the said United States, passed the 22d March, 1794,[1] entitled, "An act to prohibit the carrying on the slave-trade from the United States to any foreign place or country. Also for that since the 1st day of January, 1808, the said brig or vessel was built, fitted, equipped, loaded, or otherwise prepared in some port or place within the jurisdiction of the said United States, or caused to sail from some port or place within the said United States by some citizen or citizens of the said United States, or some other person, for the purpose of procuring negroes, mulattoes, or persons of color from some foreign kingdom, place, or country, to be transported to some port or place within the jurisdiction of the said United States, to be held, sold, or disposed of as slaves, or to be held to service or labor, in violation of a certain act of congress of the United States, passed the 2d day of March, in the year of our Lord one thousand eight hundred and seven, entitled, "An act to prohibit the importation of slaves into any port or place within the jurisdiction of the United States from and after the 1st day of January, in the year of our Lord one thousand eight hundred and eight." Wherefore the said United States, by Thomas Parker, their attorney aforesaid, pray the advice and opinion of this honorable court in the premises, and that on due proof of the allegations aforesaid, the said brig or vessel, her tackle, apparel, furniture, and other appurtenances, may be decreed and adjudged as forfeited to them, the said United States, and that such proceedings may be had thereon as are agreeable to law and justice, and the style, usage, and practice of this honorable court. THOMAS PARKER.

"*Attorney U. States, S. C. Court.*"

[*499] *C. Lee*, for the appellant.

[*500] *J. R. Ingersoll*, contrà.

THE COURT directed the following decree to be entered:—

"This cause came on to be heard on the transcript of the record, and

[1] 1 Stats. at Large, 347.

was argued by counsel, on consideration whereof, it is the opinion of the court, that the libel is too imperfectly drawn, to found a sentence of condemnation thereon. The sentence of the said circuit court is therefore reversed, and the cause remanded to the said circuit court, with directions to admit the libel to be amended."

The same point was also decided at this term, in the cases of the schooner Hoppet, the schooner Enterprise, the ship Emily, and the schooner Ann.[1]

1 W. 261; 9 W. 381; 4 H. 131.

Riggs v. Lindsay.

7 C. 500.

The defendants having ordered the plaintiff to purchase salt for them, and to draw on them for the amount, and he having so purchased and drawn, they are bound to accept and pay his bills; and if they do not, he may recover from them the amount of the bills and damages and costs of protest (if he has paid the same) upon account for money paid, laid out, and expended, and the bills of exchange may be given in evidence on that count.

If one defendant produce in evidence a letter from his codefendant to the plaintiff, the latter may give in evidence the written declarations of that codefendant to discredit the letter.

If, after the protest of the bills, the plaintiff sell the salt without orders, it shall not prejudice his right of action, although he render no account of sales to the defendants.

Note, furnished by Story, J.

[1] In the case of the Caroline, p. 496, 500, the ground upon which the sentence of this court was founded, is understood to be as follows: —

"The only offences in the statute of 22d March, 1794, ch. 11, for which a vessel could be forfeited, are that the same vessel is "fitted out," or "caused to sail," for the purpose of carrying on the slave-trade.

"The libel in this case alleges, in the alternative, that the brig Caroline 'was built, equipped, loaded, or otherwise prepared,' &c., or 'caused to sail,' &c., for the purpose of carrying on the slave-trade. It does not therefore positively allege that the vessel 'was fitted out,' or 'caused to sail;' and the libel might be true in the manner in which the charge was stated, and yet no offence committed which would induce a forfeiture of the vessel. For if the vessel was 'built, or loaded, or prepared,' for the purpose of the slave-trade, the alternative averment in the libel would be completely satisfied; and yet if she was not "fitted out," or "caused to sail," she could not be forfeited. The facts, therefore, constituting the offence, not being directly averred, the libel could not be sustained. But the court did not mean to decide that stating the charge in the alternative would not have been sufficient if each alternative had constituted an offence for which the vessel would have been forfeited.

"The same observations are applicable to the count founded on the act of 2d of March, 1807, ch. 22." 2 Stats. at Large, 426.

ERROR to the circuit court for the District of Columbia.

Jones and *Harper*, for the plaintiff.

F. S. Key and *Morsell*, for the defendant.

[*501] *The facts of the case are stated in the opinion of the court, which was delivered by

LIVINGSTON, J. This was an action brought by the defendant in error, in the circuit court of the United States for the District of Columbia, against William Stewart, Charles J. Nourse, Aquila Beall, and the plaintiff in error, Elisha Riggs, as copartners, to recover from them the amount of certain bills of exchange and damages which had been drawn on them by the defendant in error to reimburse him for certain salt which he had purchased on their account, and which bills, being protested for non-payment, were afterwards paid, with damages, by the plaintiffs below. The defendant, Beall, was not found, the defendants, Nourse and Stewart, confessed judgment, and the other defendant, Riggs, pleaded the general issue.

The declaration contained several counts on the bills of exchange, and two general counts, the one for money laid out, expended, and paid, the other for money had and received, under which last counts a verdict was found for the plaintiff.

It appeared in evidence, that some time in November, 1809, Stewart and Beall, two of the defendants below, wrote a letter to the plaintiff, ordering a purchase of salt, and stating that two other persons were concerned in the said order. This letter directed him to purchase from 10 to 30,000 bushels, and authorized him to draw for the amount of such purchases on the defendants, Stewart and Beall, or on George Price & Co., of Baltimore. Purchases of salt were accordingly made by Lindsay, who from time to time apprized Stewart and Beall of the same. On the 4th January, 1810, one of the defendants wrote to Lindsay, as follows:—

[*502] *"SIR: You will hold up what salt you may have purchased, and send us a statement of your purchases. You have no doubt received Stewart and Beall's orders, requesting no further purchase. We shall some time hence direct you as to the disposal of the quantity purchased. In the mean time you may draw upon us, or upon Stewart and Beall, for the amount," &c.

It appears that Lindsay afterwards drew several bills of exchange on the parties who had subscribed the last-mentioned letter, and who

were the defendants, in favor of certain persons therein named, including his commission for purchasing. These bills were presented to the drawees, who refused to accept or pay the same, on which they were protested and returned to Lindsay, who took them up. By the laws of South Carolina, ten per cent. damages are allowed on the return of such bills under protest, and there was proof that these damages had also been paid by Lindsay. After the return of these bills and payment of them by Lindsay, he sold the salt, and the proceeds on such resale were stated by Lindsay's counsel at the trial to the jury, who were desired to deduct the same from his demand against Riggs, which was done, and a verdict given for the balance. There was no other evidence of the proceeds than such admission, and the defendant, Riggs, denied that the sum stated by Lindsay's counsel was the amount thereof.

In the course of the trial, the counsel of Riggs produced a letter from Nourse to the plaintiffs, which, as he supposed, contained a statement favorable to his client. To discredit this statement, the plaintiff produced certain interrogatories, which had been exhibited to Nourse, with his answers, which were at variance with the letter produced by Riggs.

The first exception taken, at the trial, to the conduct of the court, was to its admission of proof of the several bills which had been drawn by Lindsay, and protested and paid by him, and the instruction which it gave to the jury, that, under the count for money paid, laid out, and expended, Lindsay might recover, not his *commissions which were included in the bills, but the [*503] ten per cent. damages, if the jury were satisfied that they had been actually paid by him.

Neither in the admission of this testimony, nor in the instructions given on it, was any error committed by the circuit court. As Lindsay was expressly authorized to draw, by the letter of the 4th of January, 1810, he certainly had a right to do so, and whether the defendants accepted his bills or not, so as to render themselves liable to the holders of them, there can be no doubt that, as between Lindsay and them, it was their duty, and that they were bound in law to pay them. Not having done so, and Lindsay, in consequence of their neglect having taken them up, he must be considered as paying their debt, and as this was not a voluntary act on his part, but resulted from his being their surety, (as he may well be considered from the moment he drew the bills,) it may well be said that in paying the amount of these bills, which ought to have been paid, and was agreed to be paid by the drawees, he paid so much money for their use. Nor can any good reason be assigned for distinguishing the damages

from the principal sum, for if it were the duty of the defendants to pay such principal sum, it is as much so to reimburse Lindsay for the damages which, by the law of South Carolina, he was compelled to pay, and which may, therefore, also be considered as part of the debt due by the defendant, in consequence of the violation of their promise, contained in the letter which has just been mentioned.

The 2d exception which appears on the record is, to the admission of certain interrogatories which had been propounded to the defendant, Nourse, with his answers to the same, having an indorsement upon the same, purporting to be an acknowledgment of Nourse, that the same were correct.

In the opinion of this court, this paper was rendered proper evidence by the conduct of the defendant, Riggs, who had read as evidence for himself a letter from Nourse to Lindsay, dated the 14th April, 1810, containing, as he supposed, some matters favorable to his defence. This letter having been thus produced by Riggs [*504] himself, *it was certainly right to allow Lindsay to discredit the representations made in that letter, by showing that Nourse had himself, at another time, given a very different account of the same transaction.

The other opinions of the court below, to which exceptions were taken, may be comprised in these two; that the court erred in thinking the defendants jointly liable as copartners, and that the resale of the salt did not destroy the plaintiff's right of action. In both these opinions, this court concur with the circuit court.

It is, perhaps, as clear a case of joint liability as can well be conceived. Whatever doubt there might be, independent of the letter of the 4th of January, 1810, most certainly that letter puts this question at rest. Every one of the defendants sign it, and there is now no escape from the responsibility which they all thereby incurred to the plaintiff. Nor did Lindsay's selling the salt after he had taken up these bills, destroy his right of action against the defendants. If he has acted irregularly in so doing, he will be liable, in a proper action, for the damages which the defendants have sustained by such conduct, but such sale could not be pleaded or set up in bar to the present suit. Nor will the defendant, under the circumstances of this case, be injured by the sum which the jury have discounted from Lindsay's demand, if it shall hereafter appear, that as much was not allowed the defendants on that account as ought to have been.

The judgment of the circuit court is affirmed, with costs.

M'Intire v. Wood.

7 C. 504.

The power of the circuit courts of the United States to issue the writ of mandamus is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction.

This case came up from the circuit court for the district of Ohio.

* *Harper*, for the plaintiff. [*505]

Johnson, J., delivered the opinion of the court as follows: —

I am instructed to deliver the opinion of the court in this case. It comes up on a division of opinion in the circuit court of Ohio, upon a motion for a *mandamus* to the register of the land office, at Marietta, commanding him to grant final certificates of purchase to the plaintiff for lands, to which he supposed himself entitled under the laws of the United States.

This court is of opinion that the circuit court did not possess the power to issue the *mandamus* moved for.

Independent of the particular objections which this case presents from its involving a question of freehold, * we are [*506] of opinion that the power of the circuit courts to issue the writ of *mandamus*, is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. Had the 11th section of the Judiciary Act[1] covered the whole ground of the constitution, there would be much reason for exercising this power in many cases wherein some ministerial act is necessary to the completion of an individual right arising under laws of the United States, and the 14th section of the same act would sanction the issuing of the writ for such a purpose. But although the judicial power of the United States extends to cases arising under the laws of the United States, the legislature have not thought proper to delegate the exercise of that power to its circuit courts, except in certain specified cases. When questions arise under those laws in the state courts, and the party who claims a right or privilege under them is unsuccessful, an appeal is given to the supreme court, and this provision the legislature has thought sufficient at present for all the political purposes intended to be answered by the clause of the constitution, which relates to this subject.

[1] 1 Stats. at Large, 78.

A case occurred some years since in the circuit court of South Carolina, the notoriety of which may apologize for making an observation upon it here. It was a *mandamus* to a collector to grant a clearance, and unquestionably could not have been issued but upon a supposition inconsistent with the decision in this case. But that *mandamus* was issued upon the voluntary submission of the collector and the district attorney, and in order to extricate themselves from an embarrassment resulting from conflicting duties. *Volenti non fit injuria.*

6 W. 598; 5 P. 190; 12 P. 524; 13 P. 607; 14 P. 599; 8 H. 441.

Livingston and Gilchrist *v.* The Maryland Insurance Company.

7 C. 506.

To constitute a misrepresentation, in obtaining insurance, there must be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to a conclusion. If the expressions are ambiguous, the insurer should ask for an explanation.

If Spanish papers are taken on board by the usage of the trade, to be used in a Spanish port to protect the property, it is not a breach of warranty of neutrality to conceal them from a British cruiser.

A Spanish subject, who came here in time of peace to carry on trade, and remains here, engaged in trade, after a war began between Spain and Great Britain, is to be deemed an American merchant, although the trade in which he was engaged, could be carried on only by a Spanish subject, by the law of Spain.

If the letter submitted to the underwriters, ordering the insurance, refer to another letter previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the papers necessary to make the voyage legal.

The usage of trade may be proved by parol, although such usage originated in a law or edict of the government of the country.

The question whether the abandonment were made in due time, is not a question of fact to be exclusively left to the jury, but to be decided by them under the direction of the court.

No acts, justifiable by the usage of the trade, and done by the plaintiffs to avoid confiscation under the laws of Spain, can avoid the policy.

If the plaintiffs do any act which increases the risk of capture and detention according to the common practice of the belligerent, it may avoid the policy. It is not necessary that the risk thus increased, should be the risk of rightful capture according to the law of nations.

Error to the circuit court for the district of Maryland. in [*507] an action of covenant upon a policy of insurance (*against capture only) upon the cargo of the ship Herkimer, "from Guayaquil, or her last port of departure in South America, to New York," "warranted American property, proof of which is to be re-

quired in the United States only," " and warranted free from seizure for illicit trade." The declaration was on a loss by capture.

The case was stated as follows by MARSHALL, chief justice, in delivering the opinion of the court: —

Julian Hernandez Baruso, a Spanish subject, having obtained from the crown of Spain a license to import from Boston into the Spanish provinces of Peru and Buenos Ayres, in South America, in foreign vessels, a certain quantity of goods in the license mentioned, and to take back the proceeds in produce on payment of half duties, came to New York, in September, 1803, (Spain being then at peace with Great Britain,) for the purpose of carrying on trade under his said license.

On the 24th of August, 1804, he entered into a contract with a certain Anthony Carroll, for the transportation of a certain quantity of goods to Lima, in Peru, under the said license. Carroll died without carrying the contract into full effect.

On the 25th of January, 1805, war having then broke out between Great Britain and Spain, B. Livingston, who had been bound as Carroll's surety for the performance of the contract, entered into a new contract with Baruso for the transportation of the same goods.

The preamble recites the license, and says: The said Baruso has agreed with the said B. Livingston to make an adventure to Lima, on the conditions and stipulations following, to wit: —

1. In consideration, &c., he agrees to the following partnership with the said B. Livingston, in virtue of which he transfers to the said firm, all his powers, &c. (under the license) of sending an American vessel belonging to the said Livingston, or chartered, in which vessel shall be embarked goods to the amount of $50,000, the funds and vessel to be furnished and advanced by said Livingston.

*2. Baruso to obtain the necessary papers from the Span- [*508] ish consul, and B. Livingston to pay the duties. Baruso answerable for detention or confiscation by the Spanish government, or vessels, on account of any defect or right to send under said license, &c.

3. Livingston agrees in four months to embark the goods on board a vessel to Lima, to proceed thither, and to return to the United States with a cargo.

4. Livingston to choose the supercargo and instruct him; and as the adventure will appear on the face of the papers to belong to Baruso, he shall give the supercargo a power, and recognize him the master of the cargo, so that the consignees at Lima shall follow literally his

orders. The consignees, who were partners of Baruso, to receive a commission.

6. The said Livingston and Baruso, agree to divide equally, and part and part alike, the profits of the adventure. Livingston to have commissions on sale.

7. Optional in Livingston to sell in United States, or convey the return cargo to Europe. If he sells in the United States, Baruso may take out, at the price of sales, as much as will be equal to his rights.

8. If Livingston sends the cargo to Europe, he is to choose the supercargo, but the consignees to be chosen jointly.

9. In case of loss, Baruso to claim nothing, as his share in the profits, only accrues on the safe return of the vessel to the United States. Optional with Livingston to insure or not. Livingston not to be allowed for risk, if no insurance, more than 15 per cent. No insurance to be on the risks of the Spanish government.

12. If any loss accrues from causes not stipulated, Baruso to lose only his privilege. If loss on sale of return cargo, Baruso to sustain half.

Livingston soon afterwards chartered the ship Herkimer for the voyage, and entered into a contract with the other plaintiff, Gilchrist, one James Baxter, and Edward Griswold, for jointly carry-
[*509] ing on, with them, *the said voyage. The cargo was purchased with their joint funds, and was shipped to Lima, where, and at Guayaquil, a return cargo was received, purchased with the proceeds of the original cargo.

On the 25th of March, 1806, Mr. Gilchrist addressed to Alexander Webster & Co., at Baltimore, a letter containing an order for insurance on the cargo of the ship Herkimer, from Guayaquil, or her last port of departure in South America, to New York, against loss by capture only, warranted American property, and free from all loss on account of seizure for illicit or prohibited trade. It says, "the owners are already insured against the dangers of the seas and all other risks, except that of capture." "You have already had a description of the ship from Messrs. Church and Demmill, the agent of Mr. Jackson, and which I presume, is correct." "I think proper to mention that the insurance will be on account of Mr. Brockholst Livingston and myself. Mr. Baxter and Mr. Griswold are also concerned, but the first gentleman thinks there is so little danger of capture, that in his letter from Lima he expressly directs no insurance to be made for him against this risk, and Mr. Griswold is not here to consult. Both these gentlemen, as well as those for whom you are desired to make insurance, are native Americans."

The letter of Church and Demmill, was dated 13th February, 1806, and after describing the ship, adds, "she sailed from Boston the 12th of May last for Lima, with liberty to go to one other port in South America, not west of Guayaquil, and from thence to New York. She has permission to trade there."

This letter was laid before the board of directors, and the application at that time rejected.

The letter from Gilchrist to Webster and Co. was afterwards laid before the board, and the company made the insurance for the plaintiffs at 10 per cent.

The Herkimer, on her return voyage, was captured near the port of New York, by The Leander, a British ship of war, and sent to Halifax, where she was condemned.

* The plaintiffs gave the underwriters notice of the cap- [*510] ture, and obtained their permission to prosecute a claim for restoration without prejudice to their right to abandon. On receiving notice of the condemnation, they wrote a letter of abandonment, which was delivered to the underwriters, who refused to pay for the loss, whereupon this suit was brought.

On the return voyage, just after doubling Cape Horn, Baxter, who was supercargo and part owner, gave to Edward Giles, the third mate, a bundle of papers, partly in Spanish, telling him at the same time, that in all probability they might fall in with privateers, who might overhaul the trunk in the cabin, and if they found the papers, it was probable the vessel might be detained, as the papers were in Spanish, and they might not be able to translate them. Giles put the papers in his trunk.

After the capture, Giles was taken out of The Herkimer into The Leander, and on being asked if he had any objection to have his trunk searched, replied that he had not. The trunk was then searched and this bundle discovered. It contained papers, covering the cargo as the property of Baruso, mixed with others which showed that in fact it was the property of the plaintiffs, and of Baxter and Griswold. Evidence was given to prove, that the usage of the trade made these papers necessary. There was also an estimate of the probable value of the cargo, if shipped to Europe.

The Herkimer arrived before The Leander; and Baxter, upon his examination on the standing interrogatories, described truly the character of the voyage, and stated correctly the property in the cargo, but denied his knowledge of any papers other than those which were exhibited, as belonging to the ship.

Issue was joined on the plea, that the defendants had not broken their covenant, and the jury found a verdict in their favor.

On the trial, twenty-eight bills of exception were taken, partly by the plaintiffs, and partly by the defendants. Only those taken by the plaintiffs are now before the court.

[* 511] * The plaintiffs prayed the court below to instruct the jury, that the letter, ordering the insurance, does not contain a representation that no person, other than the said Livingston, Gilchrist, Griswold, and Baxter, was interested in the return cargo of The Herkimer; nor that all the persons interested therein were native Americans. The judges were divided on this point, and the instruction was not given.

The 5th bill of exceptions stated, that the plaintiffs prayed the court to instruct the jury, that if they believed the testimony offered by them, then there was no such concealment of the said papers as can affect the right of the plaintiffs to recover in this action, which instruction the court refused to give, but directed the jury that if they should be of opinion, that from the usage and course of trade it was necessary to have the Spanish and other papers delivered by Baxter to Giles, the 3d mate, as aforesaid, then the delivery by Baxter to Giles, and the finding and taking of the said papers by the officers of The Leander, was not such a concealment as affects the right of the plaintiffs to recover.

The 6th bill of exceptions states, that the plaintiffs then prayed the court to instruct the jury, that Baruso having removed to New York, in the United States, while Spain was neutral, for the purpose of carrying on trade, and having continued to reside in New York until after the capture of The Herkimer, the said Baruso could not, at the time of the voyage, be considered as a belligerent. This instruction the court also refused to give, but did instruct the jury that if they should be of opinion that the said Baruso settled in New York before the war between Spain and Great Britain, and remained there domiciliated and carrying on trade generally until the capture of The Herkimer, he is to be considered as a neutral; but if they should be satisfied from the testimony that he went to New York for no other purpose but to carry on trade as a Spanish subject, which he could not engage in as a neutral, and that he was not engaged in any other trade than as a Spanish subject, he cannot be considered as a neutral.

The 7th bill of exceptions states, that the court then, on the prayer of the defendants, gave to the jury the following opinion: —

[* 512] * "The court having already given an opinion, that Baruso was not a joint owner with the plaintiffs and Griswold and Baxter, in the return cargo of The Herkimer, do, in compliance with the opinion of the supreme court, leave it to the jury to determine, whether Baruso had an interest in the return cargo which increased

the risk of the said voyage, and if the risk was increased, that the policy was thereby vitiated." This opinion was given on the prayer of the defendants to instruct the jury, that the non-communication to the underwriters of papers showing Baruso to have an interest, and to be a Spanish subject, vitiated the policy.

The 8th bill of exceptions stated, that the defendants then prayed the court to instruct the jury, that if they should be of opinion that the papers which were delivered to Giles by Baxter, or any of them, increased the risk, and that if any of the papers which did so increase the risk were not necessary by the laws and usages of Spain, or the course and usage of trade between the United States and Lima, and that it was not communicated to the defendants that such papers would accompany the cargo, then the plaintiffs were not entitled to recover. The court gave the opinion.

The 9th bill of exceptions stated, that the plaintiffs prayed an instruction to the jury, that in estimating the increase of risk on the return voyage of The Herkimer, they were to consider it as a voyage which the defendants were informed, in and by the letter of Church and Demmill, was carried on under a license from the Spanish government; and the question for them to decide was, whether the risk of such a voyage, carried on under such a license, was increased by any of the circumstances relied on by the defendants to show an increase of risk in this case. This opinion the court refused to give.

The 11th bill of exceptions stated, that the plaintiffs produced a witness to prove the usage of the trade, who said that by the laws, regulations, and usages of the trade, it was necessary that the property imported into, or exported from the colony, by a foreigner, should be under a Spanish license, and appear to be Spanish property. Whereupon the defendants moved the court [*513] to instruct the jury, that this evidence is not competent to prove the municipal laws of Spain, or the usage and custom of trade established by their municipal laws. The opinion of the court was, that "no parol evidence is admissible to the jury, or if given, can be regarded by them, to prove the legislative edicts or acts of the Spanish government, or to prove any usage, custom, or course of trade conformable to such edicts or acts; but that such evidence is admissible to prove the general usage and course of trade that may depend on instructions to the government of Peru."

The 13th bill of exceptions stated, that the plaintiffs produced witnesses, ignorant of the laws of Spain, to prove their understanding of the usage of the trade; and the defendants produced counter testimony on the usage; whereupon the defendants moved the court to instruct the jury, that the testimony of the plaintiffs, if believed, was

not competent to show the usage or course of trade that The Herkimer, on her return voyage, should be accompanied with papers giving the cargo the appearance of Spanish property. The court refused to give this opinion, but instructed the jury, that if they were of opinion that the usage or course of trade from or to the province of Peru by foreigners, was to have a license from the king of Spain to trade, and to have Spanish papers on board, to show or give color that the cargo was Spanish property, the defendants were bound to take notice of such course of trade; but if the jury should be of opinion that the trade was prohibited by the laws of Spain, the plaintiffs must prove that the defendants had notice or information of such prohibition.

The 20th bill of exceptions is to an opinion of the court, that whether the abandonment was in reasonable time or not, is not a fact to be exclusively left to the jury, but to be decided by them under the direction of the court.

The 24th bill of exceptions stated, that the defendants moved the court to instruct the jury, that the insurers are not liable for any increase of risk, in consequence of any acts done by the insured
[*514] to avoid seizure *and confiscation under the laws and regulations of the Spanish government, which instruction the court gave.

The 25th bill of exceptions stated, that the counsel for the plaintiffs then moved the court to instruct the jury, that the right of the plaintiffs would not be affected by any increase of risk produced by such acts as were stated in the preceding exception, if such acts were according to the course and usage of trade on the voyage insured. This opinion the court refused to give.

The 28th bill of exceptions stated, that the plaintiffs moved the court to instruct the jury, that the increase of risk, by which alone the right of the plaintiffs to recover in this action can be effected, is an increase (by reason of some act or omission of the plaintiffs, or their agents) of the danger of rightful capture or condemnation under the law of nations. The court refused to give this opinion.

The verdict and judgment being against the plaintiffs they sued out their writ of error.

Harper, for the plaintiffs in error.

Pinkney, attorney-general, contrà.

[*534] *Marshall, C. J., after stating the case, delivered the opinion of the court, as follows: —

This perplexed and intricate case, which is rendered still more so

by the manner in which it has been conducted at the circuits, has been considered by the court. Their opinion on the various points it presents will now be given.

If the question on which the court was divided be considered literally, the answer must undoubtedly be, that the letter of the 25th of March, 1806, contains no averment that no person other than Livingston, Gilchrist, *Griswold, and Baxter, were [*535] interested in the return cargo of The Herkimer, nor that all the persons interested therein were native Americans. This would be perceived from an inspection of the letter itself, and there would be no occasion for an application to the court concerning its contents. But the real import of the question is this. Is the language of the letter such as to be equivalent to an averment that the owners named in it are the sole persons who were interested in the return cargo? If it does amount to such an averment, then it is a representation, and if it be untrue, its materiality to the risk must determine its influence on the policy. A false representation, though no breach of the contract, if material, avoids the policy on the ground of fraud, or because the insurer has been misled by it.

Upon reading the letter on which this insurance was made, the impression would probably be that the four persons named in it were the sole owners of the return cargo of The Herkimer. The inference may fairly be drawn from the expressions employed. Such was probably the idea of the writer at the time. The writer, however, might have, and probably had other motives for his allusion to other owners, than to convey the idea that there were no others. The premium might in his opinion be affected in some measure by stating the little apprehension from capture which was entertained by others, and especially by that owner who was the supercargo. If, however, it was not supposed by Mr. Gilchrist, that the persons named in his letter were the sole owners of the cargo, or if in fact they were not the sole owners, he has expressed himself in so careless a manner as to leave his letter open to misconstruction, and, in the opinion of some of the judges, to expose his contract to hazard in consequence of it.

But that part of the court which entertains this opinion, is also of opinion, that the letter ought not to be construed into a representation of any interest to grow out of the voyage distinct from actual ownership of the cargo. "The owners," says Mr. Gilchrist, "are already insured against the dangers of the seas," &c. His application was for the owners; and when he proceeds to state that others were concerned, he must be understood to say that they were concerned as owners. Consequently, if the letter implies an

[*536] averment, that he has named all the owners, *it implies nothing further, and ought not to be construed into a representation, that there were no other persons interested in the safe return of the cargo.

Others are of opinion, that to constitute a representation there should be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to the same conclusion. If the expressions are ambiguous, the insurer ought to ask an explanation, and not substitute his own conjectures for an alleged representation. In this opinion the majority of the court is understood to concur. The instruction then applied for by the counsel for the plaintiffs, on which the circuit judges were divided, ought to have been given.

5th. A majority of the court is also of opinion, that the instruction prayed for as stated in the fifth exception ought to have been given. If the jury believed the facts offered in evidence by the plaintiffs, which were that by the usage of the trade to Peru from any foreign port, it was necessary for the ship to have on board, on her return voyage, the Spanish and other material papers delivered by Baxter to Giles, then there was no such concealment of said papers as can affect the right of the plaintiff to recover in this action. In general, concealment of papers amounts to a breach of warranty. But when the underwriters know, or, by the usage and course of the trade insured, ought to know, that certain papers ought to be on board for the purpose of protection in one event, which, in another, might endanger the property, they tacitly consent that the papers shall be so used as to protect the property. The use of the Spanish papers was to give a Spanish character to the property in the Spanish ports; and, of the American papers, to prove the American character of the property to other belligerents. But to have exhibited the Spanish papers to a British cruiser, and thus to induce a suspicion that the property was belligerent, would have been not less improper than to have exhibited the proofs of American property in a port of Peru, and thus to defeat the sole object for which Spanish papers were necessarily taken on board.

6th. A majority of the court is also of opinion, that under [*537] all the evidence in the cause, Baruso was to be *considered as an American merchant, whether he carried on trade generally, or confined himself to a trade from the United States to the Spanish provinces. The circuit court, therefore, erred in making the neutral character of Baruso to depend on the kind of trade in which he was engaged, instead of its depending on residence and trade, whether general or limited.

7th. The instruction of the circuit court to which the seventh ex-

ception was taken, is obviously formed on a plain and total misconstruction of the former opinion of this court. In no part of that opinion has the idea been indicated, that the interest of Baruso was a question solely for the consideration of the jury unaided by the judge. It is certainly a question on which it was proper for the judge to instruct the jury. The opinion, given by this court, was, that "if the jury should be of opinion that the Spanish papers, mentioned in the case, were material to the risk, and that it was not the regular usage of trade to take such papers on board, the non-disclosure of the fact, that they would be on board, would vitiate the policy; but if the jury should be of opinion that they were not material to the risk, or that it was the regular usage of the trade to take such papers on board, that they would not vitiate the policy." The instruction of the circuit court to the jury ought to have conformed to this direction. Instead of doing so, those instructions were to exclude entirely from the consideration of the jury the regular usage of trade. They refuse to allow any influence to a fact, to which this court attached much importance. It is the unanimous opinion of this court that in giving this instruction the circuit court erred.

8th. The circuit court seem also to have varied from the directions formerly given by this court, in the opinion to which the eighth exception is taken. This court placed the innocence or guilt of having on board the Spanish papers, mentioned in the case, on the regular usage of trade; the circuit court has made their innocence to depend on their being necessary.

The counsel for the defendants contends, that this is a distinction without a difference; but it is impossible to say what difference this distinction might make *with the jury. It is [*538] also the opinion of this court, that in estimating the materiality of the papers to the risk, their effect, taken together, should be considered, not the effect of any one of them taken by itself.

9th. The opinion which the court refused to give, to which refusal the ninth exception is taken, depends on several distinct propositions which must be separately considered.

The letter, on which this insurance was made, contains a direct reference to a previous letter written by Church and Demmill, which was laid before the company, for a description of the ship. The first question to be considered is, did this reference make it the duty of the directors to see that letter, and are they, without further proof, to be considered as having read it. The letter was addressed to, and it is to be presumed remained in the possession of, the agent who made this insurance.

It is a general rule, that a paper, which expressly refers to another

paper within the power of the party, gives notice of the contents of that other paper. No reason is perceived for excepting this case from the rule. It is fairly to be presumed that, on reading the letter of Gilchrist, the board of directors required the agent of the plaintiffs to produce the letter of Church and Demmill, unless they retained a recollection of it. In that letter, they were informed that the vessel had sailed for Lima, with liberty to go to one other port in South America, and that "she had permission to trade there."

What was the amount of the information communicated by this letter?

The permission to trade was unquestionably a permission granted by the authority of the country. It was a permission from the Spanish government. But whether this permission was evidence by a license, or by other means, was to be decided by other testimony; whether it conveyed notice to the underwriters that such a license was on board the ship, depends, in the opinion of part of the court, on the usage of the trade. Those, who entertain [*539] this opinion, think, that as this was submitted *to the jury, the court committed no error in refusing to say that the defendants were to be considered as knowing that The Herkimer sailed with a Spanish license on board. In estimating the increase of risk, it was certainly the duty of the jury to consider it as a voyage known to the underwriters to be carried on for the purpose of trading to Lima, and that The Herkimer had such papers on board as were usual in such a trade, but whether the license be such a paper or not, the jury were to judge as of other facts.

A majority of the court, however, is of a different opinion. The underwriters, having full notice that the voyage was permitted, might fairly infer that it was licensed by the Spanish government; because in no other way would it be permitted. The whole question turned upon the construction of a written document which it belonged to the court to make.

11th and 13th. The 11th and 13th exceptions may properly be considered together, since they are taken to opinions given on the same subject, and do not essentially vary from each other. The circuit court appears to have supposed that the general usage and course of trade could not be given in evidence, or, if given in evidence, ought to be disregarded, if the jury should be of opinion that such usage was founded on the laws or edicts of the government of the country where the usage prevailed. That is not the opinion of this court. The usage may be proved by parol, and the effect of the usage remains the same, whether it originated in an edict or in instructions given by the government to its officers. Any conjectures,

which the jury or the witnesses may make on this subject, can be of no importance, and ought to have no influence on the case. Neither can it be more necessary to give notice of a usage founded upon statute, than of a usage founded on instructions. The circuit court, therefore, erred in directing the jury that the underwriters were not bound to take notice of the usage of trade, if they should be of opinion that the trade was prohibited by the law of Spain.

20th. The opinion of the circuit court to which the 20th exception was taken, appears to be entirely correct.

* 24th and 25th. The 24th and 25th exceptions are to the [* 540] same opinion, somewhat varied in form, and rendered more explicit, on the application of the plaintiffs, than it had been in the instruction given on the motion of the defendants. It is essentially the same with that to which the 7th exception was taken, and appears to have been founded on a total misapprehension of the former opinion given by this court. In that opinion, it was expressly stated that such papers as, conformably to the regular usage of trade, were to be taken on board a vessel, would not vitiate the policy. " The acts, done by the insured to avoid seizure and confiscation under the laws and regulations of the Spanish government," which are mentioned in the application made to the court by the counsel for the defendants, comprehend these papers. This question, therefore, was decided by this court on the former argument of this cause, and the court is now unanimously of opinion, that the circuit court erred, both in granting the prayer of the defendants, and refusing that of the plaintiffs.

28th. In the opinion, to which the 28th exception was taken, this court concurs with the circuit court. The direction, asked by the counsel for the plaintiffs, ought not to have been given. It is expressed in terms which, if assented to, might misguide the jury. Rightful capture, according to the law of nations, might be construed to mean capture for a cause which would justify condemnation, according to the law of nations as construed in the United States. But capture will always be made on suspicion of what the belligerent construes to be cause of forfeiture, and capture authorizes abandonment. Such acts or missions therefore, of the plaintiffs, as would induce a capture and detention according to the common practice of the belligerents, are proper for the consideration of the jury, in estimating the risk.

This court is of opinion, that there is error in the proceedings of the circuit court in this cause, in refusing to give the opinion on which that court was divided; and also in the opinions to which the 5th, 6th, 7th, 8th, 9th, 11th, 13th, 24th, and 25th exceptions are taken.

This court doth therefore reverse and annul the judgment rendered by the circuit court, and doth remand the cause to the said
[*541] court, that *a venire facias* *de novo* may be awarded, and other proceedings had therein according to law.

STORY, J. I concur in the judgment of reversal which has just been pronounced. But as in some instances I differ from the opinions expressed by the majority, and in others I concur upon grounds somewhat variant, I have ventured to express my own views at large upon the important points which have been so fully and ably argued.

The first question which presents itself is on the certificate of division. To constitute a representation, there should be an explicit affirmation or denial of a fact, or such an allegation as would irresistibly lead the mind to the same conclusion. If the expressions are ambiguous, or such as the parties might fairly use without intending to authorize a particular conclusion, the insured ought not to be bound by the conjectures, or calculations of probability, of the underwriter. The latter, if in such case he deems the facts material, ought to make further inquiries. In the letter of the 26th of March, 1806, there are no words negativing the existence of other interests than those of the plaintiffs and Messrs. Griswold and Baxter.

The negative, if any, is to be made out by mere inference or probable conjecture, and as there is no reason to suppose that the statement was made with that intent, I am satisfied that it did not amount to a representation negativing the existence of such interests. The court below ought, therefore, to have given the direction prayed for by the plaintiff's counsel.

But, even admitting that the letter did contain the representation contended for, I am well satisfied that it was substantially true. It is not pretended that any other person except Baruso had any interest in the cargo; and it is very clear that, whatever might be his contingent interest in the possible profits of the voyage, he had no vested interest in the cargo itself. He was not a partner, for he wanted one of the essential characteristics of partnership, a direct vested interest in the joint funds. He possessed a mere possibility which, in
[*542] *the successful termination of the voyage, might entitle him to a right of action for a proportion of the profits; or, in a specified case of election, to take a proportion of the property itself. But it was not such an interest as was liable to capture, or such as could be claimed or condemned in a prize court. It was less certain than even a *respondentia* or bottomry interest, which have not been allowed to be asserted before the prize jurisdiction. The commissions of a supercargo upon the sales might, with as much propriety, be deemed a vested interest in the cargo consigned to his care.

I pass over, for the present, the fifth exception.

The sixth exception points to the national character of Baruso. As Baruso emigrated from Spain to the United States during a time of peace, no question arises as to the ability of a belligerent subject to change his national character *flagrante bello*.

It is clear, by the law of nations, that the national character of a person, for commercial purposes, depends upon his domicile. But this must be carefully distinguished from the national character of his trade. For the party may be a belligerent subject and yet engaged in neutral trade; or he may be a neutral subject and yet engaged in hostile trade. Some of the cases respecting the colonial and coasting trade of enemies have turned upon this distinction.

But whenever a person is *bonâ fide* domiciled in a particular country, the character of the country irresistibly attaches to him. The rule has been applied with equal impartiality in favor and against neutrals and belligerents. It is perfectly immaterial what is the trade in which the party is engaged, or whether he be engaged in any. If he be settled *bonâ fide* in a country with the intention of indefinite residence, he is, as to all foreign countries, to be deemed a subject of that country. Without doubt, in order to ascertain this domicile, it is proper to take into consideration the situation, the employment, and the character of the individual. The trade in which he is engaged, the family that he possesses, and the transitory or fixed character of his business, are ingredients which may properly be weighed in deciding on the nature of an equivocal residence * or [* 543] domicile. But when once that domicile is fixed and ascertained, all other circumstances become immaterial.

The prayer of the plaintiffs, which was refused by the court, in effect asked that if Baruso was *bonâ fide* settled in New York, and had no domicile elsewhere, he was not to be considered as a belligerent. The court in effect declared that the character of his trade, and not his mere domicile, fixed his national character. There was, therefore, error both in the refusal and in the direction of the court.

The seventh exception arose from a misconception of the opinion of the supreme court. The court did not mean to intimate that whether an interest increased the risk or not was a mere question of fact for the jury. On the contrary, the court considered that it was a mixed question of law and fact, on which the court were bound to direct the jury as to the law. As the court below were of opinion that Baruso was not a joint owner of the cargo, in which opinion I concur, the question ought not to have been left to the jury in the broad and unqualified terms which are used. Strictly and legally speaking, Baruso had no interest in the cargo; and therefore "his

interest could not be material to the risk;" and if the point, meant to have been left to the jury, was, whether the concealment of the name or the possibility of interest of Baruso increased the risk, it should have been left with proper directions as to the effect of the usage of trade and neutral character of Baruso in settling that question. If the usage of trade allowed or required such cover, or if Baruso were a neutral, I am not prepared to say that, in point of law, the risk could thereby have been increased. It would have been a mere inquiry into the possible hazards from the rapacity of belligerents, or the possible effects of one Spanish name instead of another. Men reason differently upon such speculations.

Nor am I prepared to say that it is ever necessary for the assured to declare the national character of other distinct interests engaged in the same adventure, unless called for by the underwriter. If such interests are not warranted or represented to be neutral, the underwriter must be considered as calculating upon the [* 544] possible existence of belligerent interests, or as waiving any inquiry.

The fifth and eighth exceptions may be considered together as they are founded upon the legal effect of the taking on board and the concealment of the papers, by Baxter, from the belligerent cruiser. The prayer of the plaintiffs in the fifth exception was for a direction that, under all the circumstances of the case, there was no such concealment as would avoid the plaintiff's right to recover. And if, in point of law, the plaintiffs were entitled to such direction, the court erred in their refusal, although the direction, afterwards given by the court might, by inference and argument, in the opinion of this court, be pressed to the same extent. For the party has a right to a direct and positive instruction; and the jury are not to be left to believe in distinctions where none exist, or to reconcile propositions by mere argument and inference. It would be a dangerous practice, and tend to mislead instead of enlightening a jury.

The opinion of the court in effect was, that the concealment of any papers, which were necessary to be on board by the usage and course of the trade, did not affect the plaintiff's right to recover. But in conformity with the prayer of the defendants in the eighth exception, that if any of the papers increased the risk, and were not necessary by the usage and course of trade, and the fact, that such papers would accompany the cargo, was not disclosed to the underwriters, the plaintiffs were not entitled to recover.

It is undoubtedly true that the warranty of neutrality extends, not barely to the fact of the property being neutral, but that the conduct of the voyage shall be such as to protect and preserve its neutral

character. It must also be conceded that the acknowledged belligerent right of search draws after it a right to the production and examination of the ship's papers. And if these be denied, and the property is thrown into jeopardy thereby, there can be no reasonable doubt that such conduct constitutes a breach of the warranty.

Concealment and even spoilation of papers, do not ordinarily induce a condemnation of the property; but *they [* 545] always afford cause of suspicion, and justify capture and detention. In many cases the penal effects extend in reality, though indirectly, to confiscation. For if the cause labor under heavy doubts, if the conduct be not perfectly fair, or the character of the parties are not fully disclosed upon the papers before the court, the concealment or spoilation of papers is made the ground of refusing further proof to relieve the obscurity of the cause; and all the fatal consequences of a hostile taint, follow on the denial.

But the question must always be whether there be a concealment of papers material to the preservation of the neutral character. It would be too much to contend that every idle and accidental, or even meditated, concealment of papers, manifestly unimportant in every view before the prize tribunal, should dissolve the obligation of the policy. And if by the usage and course of trade it be necessary or allowable to have on board spurious papers covered with a belligerent character, whatever effect it may have upon the rights of the searching cruiser, it would be difficult to sustain the position, that the concealment of such papers, which, if disclosed, would completely compromit or destroy the neutral character, would be a breach of the warranty. In such case, the disclosure of the papers produces the same inflamed suspicions, the same legal right of capture and detention, the same claim for further proof, and the same right to deny it, as the concealment would. If the concealment would induce the conclusion that the interest was enemy's, covered with a fictitious neutral garb, the disclosure would not in such a case less authorize the same conclusion. In such case, it would depend upon the sound discretion of the court, under all the circumstances of the case, to allow the veil to be drawn aside, and admit or deny the claimant to assume his real character. Whenever, therefore, the underwriter has knowledge and assents to the cover of neutral property under belligerent papers, as he does in all cases where the usage of the trade demands it, he necessarily waives his rights under the warranty, so far as the visiting cruiser may demand the disclosure of such papers. In other words, he authorizes the concealment in all cases where it is not necessary to assume the belligerent national character for the purpose of protection.

[* 546] * If this view be correct, it is clear that the court ought to have given the direction prayed for by the plaintiffs. Sitting here under a clause in the policy which enables us to look behind the sentence of condemnation, we see that the property was really neutral; and if the jury believed the evidence, the concealment was of papers which were authorized by the course of trade for the voyage, and so far from giving a hostile character, was the only means of preventing a strong presumption of that character. If we but consider the known course of decisions in the British courts on questions of this nature, we shall find that, independent of the question of the neutral or hostile character of the ostensible owner, the trade between the belligerent mother country and its colony affects with condemnation the property engaged in it, although such property be neutral, and there be an interposition of a neutral port in the course of the voyage. On examining the papers in this case, it will be found that they point, though obscurely, to such an ultimate destination. And at all events the existence of contradictory papers, one set American, the other Spanish, would, in a Spanish trade, afford an almost irresistible inference in a prize court that the property was really Spanish. *Noscitur ab origine.* It would take its character from its origin.

But it is immaterial, in my view, whether a prize court would, under such circumstances, acquit or condemn. When the cover of a Spanish character was allowed, it was allowed for the purposes of protection; and the disclosure of it was not required elsewhere than in the Spanish dominions. One of the risks against which the insured meant to guard himself was, in my judgment, a loss on account of the use of the Spanish character; a loss which might have been more plausibly resisted, if there had been a disclosure instead of a concealment of it.

The court also erred in declaring, in the eighth exception, that the taking on board of any of the papers, which were not necessary by the usage of the trade, if the risk thereby were increased, avoided the plaintiffs' right to recover. The effect of the whole papers should have been taken together. The evidence did not authorize [* 547] the court to consider and separate the effect of * each single paper. If one unnecessary paper might have increased the risk, if singly considered, and yet, if accompanied by the others, it would not have had that effect, certainly the existence of that paper with the others would not have destroyed the right of the plaintiffs. Yet the opinion of the court would have authorized the jury to draw a different conclusion.

The court should have directed the jury that if the papers were authorized by the usage and course of the trade, the concealment of

them, under the circumstances, did not vitiate the policy; and that, if some were authorized and others not, yet the possession or concealment of the latter with the former did not vitiate the policy, unless the unauthorized, so connected with the authorized, papers increased the risk.

The question, presented by the 9th exception, is whether the defendants are to be considered as having notice that the voyage insured was to be pursued under a Spanish license. The letter of the 26th March, 1806, expressly refers to the letter of 17th of February, 1806, which had been laid before the underwriters; and they must therefore be deemed conversant of all the facts therein stated. A party shall be taken to have notice of all facts of which he has the means of knowledge in his own possession, or is put directly upon inquiry by reference to documents submitted to his inspection. In the letter of the 17th February, the ship is declared to have a permission for the voyage, which in this trade can be understood in no other sense than a license. The court ought, therefore, to have given the direction prayed for by the plaintiffs.

The court erred in the opinion expressed in the 11th exception. The course and usage of trade may in all cases be proved by parol, whether such course and usage of trade arise out of the edicts or out of the instructions of the government, and whether the trade be allowed or prohibited by such edicts or instructions.

The court erred also in the latter part of their direction to the jury under the 13th exception. It was immaterial whether the trade was or was not prohibited by the laws of Spain. In either case the underwriters *were bound to take notice of the usage [*548] and course of the trade. The public laws of a country, affecting the course of the trade with that country, are considered to be equally within the knowledge and notice of all the parties to a policy on a voyage to such country.

The 20th exception cannot be supported. The opinion of the court was entirely correct.

The 24th and 25th exceptions ought to be considered together in order to present the opinion of the court below with its full effect. It is clear that any acts done by the assured in the voyage according to the course and usage of the trade, although such acts may increase the risk, do not vitiate the policy. This opinion was pronounced by this court on the former argument of this case, in reference to the Spanish papers to which the present application of the defendants obviously pointed. The court, therefore, erred in granting the prayer of the defendants, and in refusing that of the plaintiffs.

The last (the 28th) exception cannot be sustained. The proposi-

tion is conceived in too general terms, and might mislead the jury. Any acts or omissions of the insured or his agents which, according to the known edicts or decisions of the belligerents, though not according to the law of nations, would enhance the danger of capture or condemnation, might, if such acts or omissions were unreasonable, unnecessary, or wanton, form a sound objection to the right of recovery. The insured can have no right to jeopardize the property by any conduct which the fair objects of the voyage, or the usage of the trade, do not justify.

YOUNG *v.* GRUNDY.

7 C. 548.

Although the consideration of a promissory note fail, by reason of the failure of the payee to perform his part of the agreement upon which it was given, yet if a new agreement as a substitute for the old one be entered into between the original parties to the note, this failure of the original consideration creates no equity in favor of the maker of the note against the indorsee, even in Virginia.

THIS was an appeal from a decree of the circuit court for the District of Columbia, sitting in Alexandria, as a court of equity.

*549] *Young brought a bill in equity against Grundy to be relieved from a judgment at law, obtained by Grundy against him on a promissory note given by him in Virginia, to one William Chambers, from whom it passed, by several intermediate indorsements, to Grundy. It was given in 1795 for part of the purchase-money of a large tract of land in Virginia, which Chambers and others contracted to sell and convey to Young. It was afterwards discovered that Chambers and others had been imposed upon, and that they had title only to a very small part of the land they had sold to Young; whereupon, a new agreement was entered into on the 6th September, 1798, between Chambers and others and Young, by which the original contract was rescinded, and compensation made to Young for the injury he had sustained by their breach of contract, and provision was made to reimburse him the moneys he had paid, and to take up paper of his, equivalent to that which was then outstanding, and which he had issued for the original purchase-money.

Young, in his bill, contended that Chambers and others had not complied with this new agreement, but that they owed him more than enough to cover this note.

In the court below the injunction was dissolved, and upon final hearing the bill was dismissed. Young appealed to this court.

E. J. Lee, for the appellant.

Swann, contrà.

* LIVINGSTON, J., delivered the opinion of the court, as fol- [* 550] lows: —

Whatever equity the complainant may once have had against the payee or holder of the note for 433*l.* 15*s.* which was assigned to George Grundy, in consequence of the non-performance of the agreement of the 15th of May, 1795, this court is of opinion that all such equity was done away by the contract of the 6th September, 1798. This last contract was made for the express purpose of making the complainants a compensation for the loss they had sustained by the non-performance of the other, and was evidently received as an equivalent or substitute therefor. By this latter contract, then, they were placed, as it respected the holders of all their notes, precisely in the same situation as if there had been no want or failure of consideration of the agreement made in 1795. Whether the agreement of 1798 has been complied with it is not material to inquire, because, previous thereto, this note was held by Grundy, who cannot be affected by any claim which the complainant may have against the other defendants in consequence of any subsequent transactions between the parties.

The court is of opinion that the decree of the circuit court be affirmed with costs.

PALMER *v.* ALLEN.

7 C. 550.

In the district of Connecticut, the marshal may, upon an attachment for debt, without a *mittimus*, commit the defendant to prison for want of bail.

ERROR to the supreme court of errors of the State of Connecticut.

* JOHNSON, J., delivered the opinion of this court, as fol- [* 563] lows: —

This suit comes up from the state court of Connecticut, to reverse

a judgment of that court. The defendant here brought an action below, against Palmer, and recovered damages for a supposed assault and false imprisonment. The facts of the case were these: Palmer is a deputy marshal, and in that capacity, arrested the body of Allen, on a writ sued out by the United States, to recover a penalty which Allen was charged with having incurred by a violation of a law of the United States. In this suit bail was demanded, and upon Allen's failing to give it, he was committed to prison. The illegal act with which Palmer was charged, was committing the defendant to jail without a *mittimus* from a magistrate. It appears that it is the practice of that State, and in this case the majority of the judges decided it to be the law, that such a *mittimus* must be obtained, before
[* 564] a defendant in a civil suit can be * committed to prison. The practice, however, in the courts of the United States, in that district, has been the reverse.

To this action, the defendant pleaded a justification; and on demurrer, the state court adjudged the plea insufficient, for want of setting forth such a *mittimus;* no question was made of the correctness of taking the body of Allen, or detaining him, until he should give bail. It was supposed that the law of the United States,[1] which enacts that the form of writs, executions, and other processes, "and the forms and modes of proceeding in suits of common law, shall be the same as are now used" in the state courts respectively, gives efficacy to the laws of Connecticut on this subject, and imposes upon the officers of the United States an obligation to conform their conduct to the provisions of those laws.

But this court are unanimously of a different opinion. The plea made out a sufficient justification, and ought to have been sustained as such. A writ, known to the jurisprudence of that State, issues to the marshal in the alternative, commanding him to attach the goods of the defendant to a certain amount, and for want of such goods, to take his body: under this writ, not only in conformity to the literal meaning, but according to the established usage and received opinions of that State, the officer was sanctioned in taking the person of the defendant into actual custody — and the 65th[2] section of the collection law of March 2, 1799, expressly authorizes a demand of bail. Detention, therefore, until bail was given, was strictly authorized by law, and the defence to the assault and imprisonment was complete. Committing the defendant to the state prison, was but one mode, and the least exceptionable mode of detaining his person, and if it was not so, it would only be the ground of a special action on the case against the officer for maltreatment, or oppression.

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[1] 1 Stats. at Large, 93.

[2] Ib. 676.

But it is equally clear to this court, that the law above alluded to, commonly called the Process Act, does not adopt the law of Connecticut, which requires the *mittimus* in civil cases. This is a peculiar municipal regulation, not having any immediate relation to the progress of a suit, but imposing a restraint upon their * State [* 565] officers in the execution of the process of their courts, and is altogether inoperative upon the officers of the United States, in the execution of the mandates which issue to them. The judgment below must be reversed, and judgment entered for the defendant.

10 W. 1; 5 P. 190; 6 P. 648; 1 H. 301; 2 H. 9.

YOUNG *et al.* v. BLACK.

7 C. 565.

If three joint owners of a cargo employ the master of the ship to sell it for them, and he afterwards become interested in the share of one of the joint owners, he cannot, in an action brought against him by the three joint owners to recover the amount of sales, set off his share of that amount. Upon the issue of *non-assumpsit*, the defendant may give in evidence the record of a former judgment between the same parties on the same cause of action.

It is a matter of discretion with a court, whether it will compel a party to join in demurrer to evidence. A demurrer to evidence ought not to be allowed where the party demurring refuses to admit the facts which the other side attempts to prove; nor where he offers contradictory evidence, or attempts to establish inconsistent propositions.

Quere, whether the refusal of a court to compel a party to join in a demurrer to evidence, can in any case be assigned for error?

ERROR to the circuit court for the District of Columbia.

The suit was brought by Young, Deblois, and Lawrason, against Black to recover the proceeds of the sales of a cargo shipped by the plaintiffs to the West Indies, on board the brig Active, of which the defendant was master, and to whom the cargo was consigned.

The plaintiffs, Young and Deblois, had each an interest of three eighths in the cargo, and the plaintiff, Lawrason, the other two eighths. Upon the general issue, a verdict and judgment were rendered for the defendant.

E. J. Lee, for the plaintiffs in error. [* 566]

Swann, contrà.

STORY, J., delivered the opinion of the court, as follows: —

The present action was brought by the plaintiffs in error as joint

owners of the brig Active and cargo, to compel the defendant, who was master of the said brig, to account for the proceeds of said cargo, which was sold during a voyage to the West Indies. Young owned three eighths, Deblois three eighths, and Lawrason two eighths of the cargo.

[* 567] * At the trial, upon the general issue, several exceptions were taken by the plaintiffs, which have been argued, and we are now to pronounce our decision respecting their validity.

The defendant offered in evidence a record of a former suit between the same parties, in which judgment was rendered for the defendant, supported by parol proof that the former suit was for the same cause of action as the present suit. The plaintiffs denied its admissibility under the general issue; and we are all of opinion that the objection cannot be supported.

It has been long since established, under *non-assumpsit*, the defendant may give in evidence any thing which shows that no debt was due at the time when the action was commenced, whether it arise from an inherent defect in the original promise, or a subsequent discharge and satisfaction. And the precise point now in controversy has been adjudged to be completely within the rule. If the former judgment had been for the plaintiff, there would be no doubt that it would have extinguished the demand; and it is not less conclusive because it was for the defendant. The controversy had passed in *rem judicatam*, and the identity of the causes of action being once established, the law would not suffer them again to be drawn into question.

The second exception was taken to the decision of the court, admitting evidence to show that the defendant had a subinterest in that portion of the joint cargo which belonged to Lawrason — an interest which was not proved to have been known to or acknowledged by the other owners. And we are all of opinion that the circuit court erred in admitting that evidence. The other owners had nothing to do with any private contract between Lawrason and the defendant. Any right of retainer which the latter might have against Lawrason could be enforced only in an action against Lawrason himself; but it offered no legal defence to the express contract proved to have been made with all the joint owners. It might have been contended, with as much propriety, that the defendant was entitled in such an action to a set off of a separate debt due from either of the

[* 568] owners. Nor is there any equity in such a claim * against the plaintiffs. As joint owners they had a lien upon the proceeds for the general balance between them; and had a right to have them applied in the first instance in discharge of the joint debts.

Whether, after a final settlement of the accounts of the voyage, any thing would have been due to Lawrason does not appear; and yet this evidence, admitted as it was, would have applied the general property to discharge his private contracts, although the joint account might have finally turned out against him. We hold it a sound rule of law, that a joint contract can never be defeated by the mere private contract of an individual of the concern, to whom the other parties have confided no authority for this purpose. Our opinion on this exception disposes also of the third, which is taken to parol evidence offered to show the acknowledgment of Lawrason of the subinterest of the defendant.

The last exception is of a novel character. The plaintiffs upon the whole evidence offered to demur, and prayed the court to compel the defendant to join in the demurrer. The court refused to do this, and in our opinion their refusal was perfectly correct.

A demurrer to evidence is an unusual proceeding, and is allowed or denied by the court in the exercise of a sound discretion under all the circumstances of the case. The party demurring is bound to admit as true, not only all the facts proved by the evidence introduced by the other party, but also all the facts which that evidence legally may conduce to prove. It follows, that it ought never to be admitted where the party demurring refuses to admit the facts which the other side attempts to prove; and it would be as little justifiable where he offers contradictory evidence, or attempts to establish inconsistent propositions. In the present case, the plaintiffs admit that they denied the whole defence of the defendant, and offered evidence to contradict the evidence by which that defence was attempted to be supported. There would, therefore, have been the most manifest impropriety in acceding to the prayer of the plaintiffs.

The court give no opinion whether a refusal to compel a party to join in a demurrer to evidence can in any case be assigned for error.

*On the whole, for the error of the circuit court in admit- [*569]
ting the evidence disclosed under the 2d and 3d exceptions,
the judgment must be reversed and the cause remanded, with directions to award a *venire facias de novo*.

LIVINGSTON, J. I concur with this court in reversing the judgment of the circuit court, and for the error assigned in the 2d exception. But I give no opinion on the refusal of that court to compel the defendant to join in the demurrer to evidence, which was offered by the plaintiffs, not because I have any doubt of the correctness of the decision which a majority of the judges have formed on that point,

but because I entertain a very strong conviction, and think it my duty to express it, that such refusal can never be the subject of revision upon a writ of error, the contrary of which seems to be implied by the opinion just read. Such applications must ever be made to the discretion of the court which tries the cause, and such court will generally be in a situation to decide more correctly, having all the circumstances of the case before it, than an appellate tribunal; and if it should commit a mistake in the exercise of its mere discretion in refusing to compel a party to join in a demurrer to evidence, or in refusing to grant a new trial, or in refusing to continue a cause, or in any other matter resting solely in discretion, I have no hesitation in saying, that less mischief and injury will arise from obliging parties how and then to submit to such inconveniencies, than to open a door to the endless litigation which will be produced by permitting appeals in all the variety of cases of this nature, which must necessarily arise in the progress of every contested action, and which, in Great Britain, have never yet been assigned for error.

JOHNSON, J., said he did not wish it to be understood that a writ of error would lie to a decision within the discretion of the court below.

STORY, J., said he did not mean to be understood, in delivering the opinion of the court, as stating that the refusal to com-
[*570] pel a party to join in demurrer to evidence *was a ground for a writ of error. He concurred in opinion with Judge Livingston.

MARSHALL, C. J. On that point the court has not given any opinion. The former opinions of this court on the subject of discretion, &c., are to be considered as law; but they are not to be extended further.

9 W. 576.

The Schooner Anne v. The United States.

7 C. 570.

A libel may be amended after reversal for want of substantial averments.

This was an appeal from the sentence of the circuit court for the district of South Carolina, condemning the schooner Anne for violation of the Non-Intercourse Law of March 1, 1809, (2 Stats. at Large, 528.)

C. Lee, for the appellant.

Jones, contrà.

[*572] *Marshall, C. J. The sentence of the circuit court, in this case, must be reversed for the defects in the libel, for the reasons stated in the case of The Hoppet.

Sentence reversed, and the cause remanded, with leave to amend the libel.

7 C. 496.

The United States v. January and Patterson.

7 C. 572.

When a collector of revenue has given two bonds for his official conduct at different periods, and with different sureties, a promise by the supervisor to apply his payments exclusively to the discharge of the first bond, although some of the payments were for money collected and paid after the second bond was given, does not bind the United States, and does not amount to an application of the payments to the first bond.

Error to the circuit court for the district of Kentucky.

This case was submitted to the court without argument, and

Duvall, J., delivered the opinion of the court, as follows:—

In this cause, the opinion of the court is required on a single point. The facts are these:—

The supervisor of the revenue, for the district of Ohio, in due

[*573] form of law, appointed John Arthur collector *of the revenue for the first division of the first survey of the said district. Arthur, on the 25th day of August, 1797, together with the defendants, his sureties, executed a bond to the United States, in the penalty of $4000, with condition that Arthur should truly and faithfully execute and discharge all the duties of said office according to law. The supervisor, for greater security to the government, was in the habit of renewing the commission, and renewing the office bond; and on the 23d day of March, 1799, Arthur executed another bond to the United States, with Robert Patterson surety, in the penalty of $6000, with this condition: "that if the said John Arthur has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge all the duties of said office, and shall also render and settle his accounts according to law, then the obligation to be void," &c.

Arthur proceeded to make the collections, and from the commencement of his duty to the 30th of June, 1802, was charged with the collection of $30,584.99½. On the settlement of his account in the year 1803, he was in arrear $16,181.15½, and suits were instituted on each of the bonds. The pleadings were the same in both actions. There was a plea of performance to which the plaintiffs reply and allege, as a breach of the condition, that the defendants have failed to collect and pay over the revenue arising within his district, &c., and are in arrear to the United States, &c., on which issue was joined. Pending the suits Arthur died; and they were prosecuted to judgment against the sureties only.

The supervisor kept one general account only against the collector. On the trial, the plaintiffs exhibited, on their part, the general account between them and the defendant, on which the balance, as before mentioned, is $16,181.15½. They also exhibited the balance appearing to be due by terminating the account with the period when Arthur gave the second bond, at the time his first commission was revoked, which was $6,483.59½.

The defendants, to support the issue on their part, offered the deposition of a witness, who proved that James Morrison, the late supervisor of the revenue, informed him that Arthur had paid a [*574] sufficient sum to discharge *the bond first given, and that what he had paid should be so applied. After reading the deposition, the plaintiffs introduced the supervisor himself to contradict the defendants' witness. In his testimony, he admits that the payments made by Arthur, if applied to the first bond, would discharge it; and that he might have frequently told January and others, that the whole of the bond would be paid off, if the payments made

by Arthur were appropriated exclusively to its discharge; and that he himself had entertained the opinion that they ought to be so applied. To repel the testimony of the supervisor and to support that of their witness, the defendants produced a clerk in the supervisor's office, who proved "that the defendant, January, several times called at the office of the supervisor on the subject of his bond, expressed his uneasiness about its remaining out, and his desire to get it up. That the supervisor assured him, that Arthur had paid enough to discharge that bond, and that he might make himself easy; but refused to give up the bond, because he thought that such bonds ought to remain as vouchers in his office."

The plaintiffs, on this state of the case, moved the court to instruct the jury, that the promise of the supervisor as to the application of the payments in discharge of the bond, was not of itself an appropriation of the payments, unless it was followed by some act of appropriation. The court overruled the motion, and, at the instance of the defendants, instructed the jury that, if they believed that the supervisor had made the election and promise as proven, it was a declaration of his election, how the payments made by Arthur should be applied; and that whether a formal entry, in the books of their appropriation, corresponding with that election, were made or not, was immaterial, and that the jury ought to consider the application as made.

To the opinion of the court thus given, the plaintiffs excepted, and this court must now decide as to the correctness of the opinion of the court below.

The law, with respect to the application of particular payments when the debtor owes distinct debts, has *long [*575] since been settled. The debtor has the option, if he thinks fit to exercise it, and may direct the application of any particular payment at the time of making it. If he neglects to make the application, the creditor may make it; if he also neglects to apply the payment, the law will make the application.

In this case, a majority of the court is of opinion that the rule adopted in ordinary cases is not applicable to a case circumstanced as this is; where the receiver is a public officer not interested in the event of the suit, and who receives on account of the United States, where the payments are indiscriminately made, and where different sureties, under distinct obligations, are interested. It will be generally admitted that moneys arising due, and collected subsequently to the execution of the second bond, cannot be applied to the discharge of the first bond, without manifest injury to the surety in the second bond; and *vice versa*, justice between the different sureties can only

be done by reference to the collector's books, and the evidence which they contain may be supported by parol testimony, if any in the possession of the parties interested.

The court is of opinion that the circuit court erred in the opinion given, and that it be reversed.

Judgment reversed.

7 C. 575; 12 W. 505; 1 H. 250; 7 H. 681.

The United States *v.* Patterson.

7 C. 575.

A debtor of the United States, who puts evidence of debts due to himself, into the hands of a public officer of the United States, to collect and apply the money, when received, to the credit of such debtor in account with the United States, is not entitled to such credit until the money gets into the hands of a public officer of the United States entitled to receive it. Its being in the hands of an agent of a person who at the time when the claims were put into his hands for collection was a public officer of the United States, entitled to receive debts due to the United States, but whose office became extinct before the money was received by his agent, is not sufficient to entitle such debtor to a credit in account with the United States therefor.

This was also a writ of error to the circuit court, for the district of Kentucky.

The case was submitted without argument, and Duvall, J. delivered the opinion of the court, as follows:—

[*576] *This case has been considered in connection with that against January and Patterson.

A suit was instituted on the bond dated 23d March, 1799, against Arthur and Patterson; and pending the suit Arthur died. The defendant pleaded performance, to which the plaintiffs replied, alleging as a breach of the condition, that the stipulations therein contained had not been performed, and that the defendant was in arrear to the plaintiffs the sum of $16,181.15½, &c., on which issue was joined.

The evidence, exhibited in the suit against January and Patterson, was produced in this case. On the trial, the defendant took several exceptions, but not having appealed, they are not open to examination.

The plaintiffs also took an exception to the allowance of a credit to the defendant. The supervisor had received the evidence of a number of outstanding debts due to Arthur, which he undertook to

collect, and promised to apply the proceeds to Arthur's credit. Among them was the bond of Beelor and Moore, which was sued; at the trial of this suit, it appeared that the amount of that bond had actually come into the hands of the agent of the person who had been supervisor; but that office being extinct, it was contended on the part of the United States, that the payment could not be considered as a payment to government. The court was of a different opinion, and instructed the jury accordingly; to which opinion of the court, an exception was taken, and a writ of error prosecuted.

This court is of opinion, that the circuit court erred in the decision thus made. The reception of the outstanding debts by the supervisor, for the purpose of having suits commenced for the recovery of them, was an accommodation to the defendant, who could not be justly entitled to credit until the money was in the hands of some public officer authorized to receive it.

Judgment reversed.

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* LIVINGSTON *v.* DORGENOIS. [*577]

7 C. 577.

IN this case, a writ of error was brought to reverse the order of the district court for the territory of Orleans, staying the proceedings in a suit brought by the plaintiff against the defendant, marshal of the territory, upon a suggestion of the attorney for the United States, who was not party to the proceeding. After argument the plaintiffs counsel dismissed the writ of error, and moved for a *mandamus, nisi,* to the district judge, in the nature of a *procedendo,* which was granted.

5 P. 190.

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* OTIS *v.* BACON. [*589]

7 C. 589.

By the 11th section of the act of 25th April, 1808, (2 Stats. at Large, 501,) the collector had no right to detain a vessel and cargo after her arrival at her port of destination, under a suspicion that she intended to violate the embargo.

ERROR to the supreme judicial court of the State of Massachusetts. The material facts are stated in the opinion of the court.

Jones, for the plaintiff.

Amory, and *P. B. Key*, contrà.

[*593] *WASHINGTON, J., delivered the opinion of the court, as follows: —

This is an appeal from the supreme judicial court of the commonwealth of Massachusetts, under the 25th section of the Judiciary Law.[1] The judgment complained of was rendered in an action of trover and conversion, brought by the appellee against Joseph Otis, Crowell, and the appellant, for taking and converting a quantity of flour, the property of the appellee. The trial took place between the appellee and appellant, Joseph Otis having died after the commencement of the suit; and the process not having been served on Crowell. The verdict having been in favor of the plaintiff, the appellee, judgment was rendered thereupon in his favor.

By a bill of exceptions taken to the charge of the court, the following facts appear to have been given in evidence. That Bacon, having obtained from the governor of Massachusetts such a certificate as authorized him, under a provision in one of the embargo laws, to transport a cargo of flour from some of the southern

[*594] *States to the district of Barnstable, did accordingly procure such a cargo at Baltimore, and arrived with it in the schooner Ann, at a place called the Mud-hole, in the port and district of Barnstable, on the 2d of October, 1808. On the 3d of the same month, a permit to land the cargo was granted by Joseph Otis, the collector of the port. The day following the vessel and cargo were seized by Crowell, the inspector of the port. Bacon immediately called at the collector's office to inquire into the cause of the seizure, and was informed by Joseph Otis that he had not authorized it. But William Otis, the deputy collector, in answer to an offer made by Bacon to give bond and security to any amount if he would release the vessel, said: "I have got your vessel, and I will keep her." The offer to give bond not to go anywhere with the vessel and cargo was repeated, but William Otis refused to give her up. Bacon then proposed to unlade the vessel, and again offered bonds, which Otis, the appellant, refused, and said: "You may see the flour landed, but you shall not have it after it is landed." The appellee then abandoned the property to the appellant, and the next day made a protest, and abandoned before a notary public. The seizure and detention of the

[1] 1 Stats. at Large, 85.

vessel and cargo, by Crowell, is fully proved. On the third day after the seizure, Crowell removed the vessel to Bass River, six miles south-east of Mud-hole; and on the 13th of October, 233 barrels and 49 half barrels of the flour were landed and delivered to the appellee. The vessel, with the residue of the cargo, for the conversion of which residue this suit was brought, was afterwards carried away by persons unknown, and the cargo sold in the West Indies.

Upon this evidence, the court charged the jury that if they believed the evidence of the declaration of William Otis, and of the other circumstances in this case respecting the seizure and detention of the said vessel and her cargo, it was sufficient in point of law to maintain the issue on the part of Bacon, and to prove the conversion of the 298 barrels and 21 half barrels of flour, which were carried off in the vessel. That the collector had no right to detain this vessel and cargo, she having arrived at her port of discharge, and obtained a permit to unlade; and that even if he had a right to
*detain the vessel, this authority did not extend to a seizure [*595]
of the cargo, and that such seizure was of itself a conversion,
and that as the defendant, Otis, had failed to make out a justification, he must be considered as a wrong doer and chargeable to Bacon for the value of said flour. But that if the jury should believe from the evidence that Bacon aided or consented to the rescue and carrying off the vessel and cargo, or had by forcible or collusive means obtained any benefit from the sale of said cargo in consequence of said rescue, then the defendant, Otis, was entitled to a verdict.

It is apparent on the face of this record that this cause in the court below turned upon the construction of the 11th section of the act of congress of the 25th of April, 1808, c. 66; and the question for this court to decide is, whether that court erred in the opinion given to the jury upon that statute. The words of the 11th section are: "That the collectors of the customs be and they are hereby respectively authorized to detain any vessel ostensibly bound with a cargo to some other port of the United States whenever, in their opinion, the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the President of the United States be had thereupon."

If this section authorized the collector to seize and detain this vessel and cargo under the circumstances in the case as detailed in this record, then the opinion of the court below was erroneous. If it gave no such authority, then it was clearly right.

The power of the collector to detain is confined to a vessel ostensibly bound with a cargo to some other port of the United States. Can a vessel which has actually arrived at her port of discharge, and

has received from the collector of the port a permit to land her cargo, be considered as a vessel ostensibly bound to some other port of the United States? We think not. The reason for authorizing the detention of a vessel before she has arrived at her port of discharge does not apply to one which has actually performed her voyage according to the stipulations of the bond given by the owner at the port of her departure. All rational grounds of suspicion of an intended
[*596] violation of the embargo laws is *then done away; for if such an intention at any time existed, it would be difficult to assign to the master or owner a motive for postponing the execution of it until after the arrival of the vessel at her port of discharge. It is, therefore, scarcely to be conceived that such a case was in the contemplation of the legislature.

It is true that this vessel had not arrived at Yarmouth, where her cargo was to be landed, at the time of the seizure. But it is sufficient, in the opinion of the court, that she had arrived at the port to which she was destined, and had received a permit to land. The voyage was as much at an end in relation to the question as if she had arrived within 100 yards of the wharf at Yarmouth. It is, therefore, the unanimous opinion of this court that there is no error in the opinion of the court below on the construction given by that court of the above statute.

Other exceptions were taken, in the course of the trial of this cause, to the opinion of the court below on rejecting certain evidence offered by the appellant. But this court has no authority, under the law which authorizes this appeal, to notice any error except such as appears on the face of the record and immediately respects the questions of validity of the constitution, treaties, statutes, commissions, or authorities in dispute.

The opinions of the court below, in relation to the evidence offered by the appellant, even if erroneous, which we neither affirm nor deny, have nothing to do with the construction of any statute of the United States; and therefore they cannot be regarded by this court.

Judgment affirmed.

2 W. 18; 6 W. 583.

THORNTON v. CARSON.

7 C. 596.

An award is not void because it is in the alternative, and contingent, nor because one of the alternatives requires the party to do an act in conjunction with others, not parties to the award, and over whom he has no control.

ERROR to the circuit court for the District of Columbia, sitting at Washington. The facts appear in the opinion of the court.

*WASHINGTON, J., delivered the opinion of the court, as [*599] follows: —

This is a writ of error to a judgment of the circuit court for the District of Columbia.

Under a rule which was served upon the plaintiff in error to show cause, during the term at which the rule was made, why judgment should not be entered on the award, he appeared and assigned for cause, that the said award was uncertain, not final, unreasonable, conditional, and void.

These objections are strictly technical, and referable solely to defects supposed to appear on the face of the award, and do not aim to impeach it for any one of the causes which the law of Maryland, passed in October, 1778, c. 21, declares to be sufficient for setting aside an award.

This court, not meaning to decide whether any and what other objections than those stated in the statute of Maryland, may be alleged against entering judgment upon awards made under orders of reference, will proceed to consider those which were stated in this case.

It is contended that this award is not final or certain, because it depends on a contingency, and will be an award in favor of the plaintiff in one event, and in favor of the defendant in another. This court does not so understand the effect of this award. It is clearly in favor of the defendant in error, in either event contemplated by the referees. The plaintiff is required, in conjunction with certain other persons, to convey to the defendant, for the benefit of himself and the heirs of Thomas Carson, on or before a fixed day, certain property specified in the award, or to pay the amount of the two bonds in suit. If he made the conveyance, then the referees have awarded certain property to the defendant; and if he failed to do this, judgment was to be entered against him, for the amount of

those bonds. The defendant had his election to do either;
[*600] and upon *satisfying the court, at the time he was required to show cause why judgment should not be entered on the award, that he had made such a conveyance as the award prescribed, the court ought to have ordered the suits to have been entered "settled."

If the plaintiff had made the conveyance, and the defendant, who, upon that act being done, was required by the award to transfer five shares in the gold-mine company of North Carolina to the plaintiff, had failed to do so, the court ought to have ordered the suits to be entered "settled." But the plaintiff, having failed to perform the act, upon which alone this transfer was to be made, and the suits were to be entered "settled," became liable to pay the sums awarded by the referees as the equivalent for the property to be conveyed, and consequently the court was right in entering the judgment for the sums awarded.

There is no uncertainty in all this; or at least none which might not be rendered certain by the act of the plaintiff in conformity with the award, and which must not necessarily be certain at the time the court was to render judgment on the award.

The plain meaning of the award is that the plaintiff was to pay the amount of the bonds in suit, unless, by a certain day, he made a conveyance to the defendant, of the property described in the award, in which latter event he was to receive from the defendant, a transfer of five shares in the gold-mine company, and to be discharged from the payment of the money, by an entry to that effect, to be made in the suits referred. But if he refused to make the conveyance, then judgment to be entered against him for the amount of the bonds in suit. If he entitled himself to this entry in his favor, by performing the other branch of the alternative, and the defendant failed to perform his part of the award, then the defendant could receive no benefit from the award, and the suits were to be entered "settled." Whether the conveyance from the plaintiff, and the transfer by the defendant, were made in due form, were questions proper for the consideration of the court.

[*601] The award is said to be uncertain, because the names *of the trustees who are to join in the conveyance, and of the heirs of Thomas Carson, are not stated, nor does the award declare who is to prepare and tender the deed. These, too, were questions proper for the consideration of the court below, but form no objections to the award. It does not appear from the record that the defendant had refused or failed to do every thing which the law required him to perform to entitle him to the judgment of the court, and we must,

therefore, presume that no delinquency on his part was shown by the plaintiff; that if it was necessary for him to prepare and tender the deed such as the law required, he did so to the satisfaction of the court. If he failed to do that which would warrant the court in entering judgment on the award, it was the duty of the plaintiff to have shown this as cause against entering the judgment, and to have spread all the facts upon the record, which might enable this court to decide whether the court below acted correctly or not.

The award is said to be unreasonable because it requires the plaintiff to get other persons to join in the conveyance to the defendant which he may not be able to do. But surely, if the plaintiff was bound to pay the bonds in suit, or to convey a good title to certain property, which title would not be valid in the opinion of the referees, unless other persons joined in the conveyance, he cannot surely complain that he is ordered to pay the money, unless he executes such a deed as will pass a good title. It is his misfortune if he cannot make the title, but it is no reason why, in that event, he should not pay the money.

There are other causes assigned why the award is unreasonable, but as the facts to prove it unreasonable do not appear in the record, they cannot be noticed by the court, even if such objections would, in law, be sufficient to set aside the award.

Judgment affirmed, with costs.

18 H. 246.

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* WALLEN *v.* WILLIAMS. [* 602]

7 C. 602.

ERROR to the circuit court of the United States for the district of East Tennessee, in a suit in equity. The decree of the court below, which was for the complainants, was reversed, because the record did not show that that court had jurisdiction. The objection that a writ of error did not lie in an equity suit was not noticed.

Jones, for the plaintiff in error.

[*603] FAIRFAX'S DEVISEE v. HUNTER'S LESSEE.

7 C. 603.

Lord Fairfax, at the time of his death, had the absolute property, seizin, and possession of the waste and unappropriated lands in the northern neck of Virginia.

An alien enemy may take lands in Virginia by devise, and hold the same until office found.

The commonwealth of Virginia could not grant the unappropriated lands in the northern neck until its title should have been perfected by possession; and the British treaty of 1794 confirmed the title to those lands in the devisee of Lord Fairfax.

THIS was a writ of error to the court of appeals of Vir-
[*604] ginia in an action of ejectment involving the construction * of the treaties between Great Britain and the United States, the judgment of the court of appeals being against the right claimed under those treaties.

The material facts appear in the opinion of the court.

C. Lee, and *Jones*, for the plaintiff.

Harper, for the defendant.

[*618] *STORY, J., delivered the opinion of the court.

The first question is, whether Lord Fairfax was proprietor of, and seized of the soil of the waste and unappropriated lands in the northern neck, by virtue of the royal grants, 2 Charles, 2 and 4 James 2, or whether he had mere seignoral rights therein as lord paramount, disconnected from all interest in the land, except of sale or alienation.

The royal charter expressly conveys all that entire tract, territory, and parcel of land, situate, &c., together with the rivers, islands, woods, timber, &c., mines, quarries of stone, and coal, &c., to the grantees and their heirs and assigns, to their only use and behoof, and to no other use, intent, or purpose whatsoever.

It is difficult to conceive terms more explicit than these to vest a title and interest in the soil itself. The land is given, and the exclusive use thereof, and if the union of the title and the exclusive use do not constitute the *dominium directum* and *utile*, the complete and absolute dominion in property, it will not be easy to fix on any thing which shall constitute such dominion.

The ground of the objection would seem to have been, that the royal charter had declared that the grantees should hold of the king as tenants in *capite*, and that it proceeded to declare that the grantees and their heirs and assigns should have power "freely and without

molestation of the king, to give, grant, or by any ways or means sell or alien all and singular the granted premises, and every part and parcel thereof, to any person or persons being willing to contract for and buy the same," which words were to be considered as restrictive or explanatory of the preceding words of the charter, and as confining the rights granted to the mere authority to sell or alien.

But it is very clear that this clause imposes no restriction or explanation of the general terms of the grant. As the grantees held as tenants in *capite* of the king, they could not sell or alien without the royal license, and if they did, it was in ancient strictness an *absolute forfeiture of the land. 2 Ins. 66; and after the [*619] statute 1 Edw. 3, ch. 12, though the forfeiture did not attach, yet a reasonable fine was to be paid to the king upon the alienation. 2 Ins. 67; Staundf. Prer. 27; 2 Bl. Com. 72. It was not until ten years after the first charter, (12 Ch. 2, ch. 24,) that all fines for alienations and tenures of the king in *capite* were abolished, 2 Bl. Com. 77. So that the object of this clause was manifestly to give the royal assent to alienations without the claim of any fine therefor.

We are therefore satisfied that, by virtue of the charter, and the intermediate grants, Lord Fairfax, at the time of his death, had the absolute property of the soil of the land in controversy, and the acts of ownership exercised by him over the whole waste and unappropriated lands, as stated in the case, vested in him a complete seizin and possession thereof. Even if there had been no acts of ownership proved, we should have been of opinion that as there was no adverse possession, and the land was waste and unappropriated, the legal seizin must be, upon principle, considered as passing with the title.

On this point, we have the satisfaction to find that our view of the title of Lord Fairfax seems incidentally confirmed by the opinion of the court of appeals, of Virginia, in Picket *v.* Dowdell, 2 Wash. 106; Johnson *v.* Buffington, 2 Wash. 116; and Curry *v.* Burns, 2 Wash. 121.

The next question is as to the nature and character of the title which Denny Fairfax took by the will of Lord Fairfax, he being, at the time of the death of Lord Fairfax, an alien enemy.

It is clear, by the common law, that an alien can take lands by purchase, though not by descent; or in other words, he cannot take by the act of law, but he may by the act of the party. This principle has been settled in the year books, and has been uniformly recognized as sound law from that time. 11 Hen. 4, 26; 14 Hen. 4, 20; Co. Litt. 2 b. Nor is there any distinction, whether the purchase be by grant or by devise. In either case, the estate vests

[* 620] in the alien. Pow. Dev. 316, &c.; Park. * Rep. 144; Co. Litt. 2 b.; not for his own benefit, but for the benefit of the State; or in the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seized into the hands of the sovereign. 11 H. 4, 26; 14 H. 4, 20. But until the lands are so seized, the alien has complete dominion over the same. He is a good tenant of the freehold in a *precipe* on a common recovery. 4 Leon, 84; Goldsb. 102; 10 Mod. 128. And may convey the same to a purchaser. Sheafe *v.* O'Neile, 1 Mass. Rep. 256. Though Co. Litt. 52, b., seems to the contrary, yet it must probably mean that he can convey a defeasible estate only, which an office found will divest. It seems, indeed, to have been held that an alien cannot maintain a real action for the recovery of lands. Co. Litt. 129, b.; Thel. Dig. ch. 6; Dyer 2, b.; but it does not then follow that he may not defend, in a real action, his title to the lands against all persons but the sovereign.

We do not find that in respect to these general rights and disabilities, there is any admitted difference between alien friends and alien enemies. During the war, the property of alien enemies is subject to confiscation *jure belli*, and their civil capacity to sue is suspended. Dyer 2, b.; Brandon *v.* Nesbitt, 6 T. R. 23; 3 Bos. and Pull. 113; 5 Rob. 102. But as to capacity to purchase, no case has been cited in which it has been denied; and in The Attorney-General *v.* Wheedon and Shales, Park. Rep. 267, it was adjudged that a bequest to an alien enemy was good, and, after a peace, might be enforced. Indeed, the common law in these particulars seems to coincide with the *Jus Gentium*. Bynk. Quest. Pub. Jur., ch. 7; Vattel, b. 2, ch. 8, § 112, 114; Grot. lib. 2, ch. 6, § 16.

It has not been attempted to place the title of Denny Fairfax upon the ground of his being an *antenatus*, born under a common allegiance before the American revolution, and this has been abandoned upon good reason; for whatever doubts may have been formerly entertained, it is now settled that a British subject born before, cannot, since the Revolution, take lands by descent in the United States. 4 Cranch, 321, Dawson's Lessee *v.* Godfrey.

[* 621] But it has been argued, that although D. Fairfax * had capacity to take the lands as devisee, yet he took to the use of the commonwealth only, and had, therefore, but a momentary seizin; that in fact he was but a mere trustee of the estate at will of the commonwealth, and that by operation of law, immediately upon the death of the testator, Lord Fairfax, the title vested in the commonwealth, and left but a mere naked possession in the devisee.

If we are right in the position, that the capacity of an alien enemy does not differ in this respect from an alien friend, it will not be easy to maintain this argument. It is incontrovertibly settled upon the fullest authority, that the title acquired by an alien by purchase, is not devested until office found. The principle is founded upon the ground, that as the freehold is in the alien, and he is tenant to the lord of whom the lands are holden, it cannot be devested out of him but by some notorious act by which it may appear that the freehold is in another; 1 Bac. Abr. Alien C. p. 133. Now an office of entitling is necessary to give this notoriety, and fix the title in the sovereign. So it was adjudged in Page's case, 5 Co. 22, and has been uniformly recognized; Park. Rep. 267; Park. 144; Hob. 231; Bro. Denizen, pl. 17; Co. Litt. 2 b.; and the reason of the difference, why, when alien dies, the sovereign is seized without office found, is because otherwise the freehold would be in abeyance, as an alien cannot have any inheritable blood. Nay even after office found, the king is not adjudged in possession, unless the possession were then vacant; for if the possession were then in another, the king must enter or seize by his officer before the possession in deed shall be adjudged in him; 14 H. 7, 21; 15 H. 7, 6, 20; Staundf. Prerog. Reg. ch. 18, p. 54; 4 Co. 58, a.; and if we were to yield to the authority of Staundford, (Prer. Reg. ch. 18, p. 56,) that in the case of alien enemy, the king "*ratione guerrae*," might seize without office found, yet the same learned authority assures us, "that the king must seize in those cases, ere he can have an interest in the lands, because they be penal towards the party;" 4 Co. 58, b.; and until the king be in possession by office found, he cannot grant lands which are forfeited by alienage; Staundf. Pre. Reg. ch. 18, f. 54; Stat. 18 Hen. 6, ch. 6.

*To apply these principles to the present case, Denny [*622] Fairfax had a complete, though defeasible title, by virtue of the devise, and as the possession was either vacant or not adverse, of course the law united a seizin to his title in the lands in controversy; and this title could only be devested by an inquest of office, perfected by an entry and seizure where the possession was not vacant. And no grant by the commonwealth, according to the common law, could be valid, until the title was, by such means, fixed in the commonwealth. It is admitted that no entry or seizure was made by the commonwealth "*ratione guerrae*" during the war. It is also admitted, that no inquest of office was ever made pursuant to the acts on this subject at any time. And it would seem therefore to follow, upon common law reasoning, that the grant to the lessor of the original plaintiff, by the public patent of 30th April, 1789, issued improvidently and erroneously, and passed nothing. And if this be true,

and there be no act of Virginia altering the common law, it is quite immaterial what is the validity of the title of the original defendant as against the commonwealth; for the plaintiff must recover by the strength of his own title, and not by the weakness of that of his adversary.

But it is contended, first, That the common law as to inquests of office and seizure, so far as the same respects the lands in controversy is completely dispensed with by statutes of the commonwealth, so as to make the grant to the original plaintiff in 1789 complete and perfect; and secondly, and further, if it be not so, yet as the devisee died pending the suit, the freehold was thereby cast upon the commonwealth without an inquest, and thus arises a retroactive confirmation of the title of the original plaintiff, of which he may now avail himself. As to the first point, we will not say that it was not competent for the legislature, (supposing no treaty in the way,) by a special act to have vested the land in the commonwealth without an inquest of office for the cause of alienage. But such an effect ought not, upon principles of public policy, to be presumed upon light grounds; that an inquest of office should be made in cases of alienage, is a useful and important restraint upon public proceedings.

[*623] No part of the United States seems to have been more aware of its importance, or more cautious to guard against its abolition than the commonwealth of Virginia. It prevents individuals from being harassed by numerous suits introduced by litigious grantees. It enables the owner to contest the question of alienage directly by a traverse of the office. It affords an opportunity for the public to know the nature, the value, and the extent of its acquisitions *pro defectu hæredis;* and above all it operates as a salutary suppression of that corrupt influence which the avarice of speculation might otherwise urge upon the legislature. The common law, therefore, ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose.

Let us now consider the several acts which have been referred to in the argument, from which we think it will abundantly appear that, during the war, the lands in controversy were never, by any public law, vested in the commonwealth. We dismiss, at once, the act of 1777, c. 9, and of 1779, c. 14, as they are restrained to estates held by British subjects at the times of their respective enactments, and do not extend to estates subsequently acquired.

The next act is that of 1782, c. 8; the 24th section, after reciting that "since the death of the late proprietor of the Northern Neck, there is reason to suppose that the said proprietorship hath descended upon alien enemies," enacts, that persons holding lands in said Neck,

shall retain sequestered in their hands, all quitrents which were then due, until the right of descent should be more fully ascertained; and that all quitrents, thereafter to become due, shall be paid into the public treasury, and the parties exonerated from the future claim of the proprietor. Admitting that this section as to the quitrents, was equivalent to an inquest of office; it cannot be extended, by construction, to include the waste lands of the proprietor. Neither the words, nor the intention, of the legislature would authorize such a construction. But it may well be doubted if, even as to the quitrents, the provision is not to be considered as a sequestration *jure belli*, rather than a seizure for alienage, for it proceeds on the ground that the property had descended, not upon aliens, but alien enemies. So far as the treaty of peace might be deemed material in the case, this distinction would deserve consideration.

* The next is the act of 1782, c. 33, which, after reciting [*624] that "the death of Lord Fairfax may occasion great inconvenience to those who may incline to make entries for vacant lands in the Northern Neck, proceeds (sec. 3,) to enact, that all entries made with the surveyors, &c., and returned to the office formerly kept by Lord Fairfax, shall be held as good and valid as those heretofore made under his direction, "until some mode shall be taken up and adopted by the general assembly, concerning the territory of the Northern Neck." This act, so far from containing in itself any provision for vesting all the vacant lands of Lord Fairfax in the commonwealth, expressly reserves, to a future time, all decisions as to the disposal of the territory. It suffers rights and titles to be acquired exactly in the same manner, and with the same conditions, which Lord Fairfax had by permanent regulations prescribed in his office. No other acts were passed on the subject during the war.

We are now led to consider the act of 1785, ch. 47, which has presented some difficulty, if it stand unaffected by the treaty of peace. The 4th section, after a recital "that since the death of the late proprietor, no mode hath been adopted to enable those who had before his death made entries within the said district according to an act, &c. (act 1782, c. 33,) to obtain titles to the same," enacts that in all cases of such entries, grants shall be issued by the commonwealth to the parties in the same manner, as by law is directed in cases of other unappropriated lands. The 5th section then declares that the unappropriated lands within the Northern Neck should be subject to the same regulations, and be granted in the same manner, and *caveats* should be proceeded upon, tried, and determined, as is by law directed, in cases of other unappropriated lands belonging to the commonwealth. The 6th section extinguishes for the future all quitrents.

The patent of the original plaintiff issued pursuant to the 5th section of this act.

It has been argued, that the act of 1785 amounts to a legislative appropriation of all the lands in controversy. That it must be considered as completely devesting the title of Denny Fairfax [*625] for the cause of alienage, and *vesting it in the commonwealth. After the most mature reflection, we cannot subscribe to the argument. In acts of sovereignty so highly penal, it is against the ordinary rule to enlarge, by implication and inference, the extent of the language employed. It would be to declare purposes which the legislature have not chosen to avow, and to create vested estates, when the common law would pronounce a contrary sentence, and the guardians of the public interests have not expreesed an intention to abrogate that law. If the legislature have proceeded upon the supposition that the lands were already vested in the commonwealth, we do not perceive how it helps the case. If the legislature, upon a mistake of facts, proceed to grant defective titles, we know of no rule of law which requires a court to declare, in penal cases, that to be actually done which ought previously to have been done. Perhaps as to grants under the 4th section upon entries under the act of 1782, c. 33, it might not be too much to hold, that such grants conveyed no more than the title of the commonwealth, exactly in the same state as the commonwealth itself held it, namely, an inchoate right, to be reduced into possession and consummated by a suit in the nature, or with the effect, of an inquest of office. But we give no opinion on this point, because the patent of the original plaintiff manifestly issued under the succeeding section, and upon a construction, which we give to this section, it issued improvidently and passed no title whatever. That construction is, that the unappropriated lands in the Northern Neck should be granted in the same manner as the other lands of the commonwealth, when the title of the commonwealth was perfected by possession. It seems to us difficult to contend, that the legislature meant to grant mere titles and rights of entry, of the commonwealth, to lands in the same manner as it did lands of which the commonwealth was in actual possession and seizin. It would be selling suits and controversies through the whole country, and enacting a general statute in favor of maintenance, an offence which the common law has denounced with extraordinary severity. Consistent, therefore, with the manifest intention of the legislature, grants were to issue for lands in the Northern Neck, precisely in the same manner as for lands in other parts of the [*626] State, and under the same *limitation, namely, that the commonwealth should have, at the time of the grant, a complete title and seizin.

We are the more confirmed in this construction by the act concerning escheators, (act 1779, c. 45,) which regulates the manner of proceeding in cases of escheat, and was by a subsequent act, (act 1785, c. 53,) expressly extended to the countries in the Northern Neck. This act of 1779, expressly prohibits the granting of any lands, seized into the hands of the commonwealth upon office found, till the lapse of twelve months after the return of the inquisition and verdict into the office of the general court, and afterwards authorizes the proper escheator to proceed to sell in case no claim should be filed, within that time, and substantiated against the commonwealth. It is apparent, from this act, that it was not the intention of the legislature to dispose of lands, accruing by escheat, in the same manner as lands to which the commonwealth already possessed a perfect title. It has not been denied that the regulations of this act were designed to apply as well to titles accruing upon purchases by aliens, which are not in strictness, escheats, as upon forfeitures for other causes; and, but for the act of 1785, c. 47, we do not perceive but that the vacant lands, held by the devisee of Lord Fairfax, in the Northern Neck, would have been completely within the act regulating proceedings upon escheats.

The real fact appears to have been, that the legislature supposed that the commonwealth were in actual seizin and possession of the vacant lands of Lord Fairfax, either upon the principle that an alien enemy could not take by devise, or the belief that the acts of 1782, c. 8, and c. 33, had already vested the property in the commonwealth. In either case it was a mistake which surely ought not to be pressed to the injury of third persons.

But if the construction, which we have suggested, be incorrect, we think that, at all events, the title of Hunter, under the grant of 1789, cannot be considered as more extensive than the title of the commonwealth, namely, a title inchoate and imperfect; to be consummated by an actual entry under an inquest of office, or its equivalent, a suit and judgment at law by the grantee.

* This view of the acts of Virginia, renders it wholly [* 627] unnecessary to consider a point, which has been very elaborately argued at the bar, whether the treaty of peace, which declares "that no future confiscations shall be made," protects from forfeiture, under the municipal laws respecting alienage, estates held by British subjects at the time of the ratification of that treaty. For we are well satisfied that the treaty of 1794 completely protects and confirms the title of Denny Fairfax, even admitting that the treaty of peace left him wholly unprovided for.

The ninth article is in these words: "It is agreed that British sub-

jects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them according to the nature and tenure of their respective estates and titles therein; and may grant, sell, or devise the same to whom they please in like manner as if they were natives, and that neither they nor their heirs or assigns shall, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens."

Now, we cannot yield to the argument that Denny Fairfax had no title, but a mere naked possession or trust estate. In our judgment, by virtue of the devise to him, he held a fee simple in his own right. At the time of the commencement of this suit, in 1791, he was in complete possession and seizin of the land. That possession and seizin continued up to and after the treaty of 1794, which being the supreme law of the land, confirmed the title to him, his heirs and assigns, and protected him from any forfeiture by reason of alienage.

It was once in the power of the commonwealth of Virginia, by an inquest of office or its equivalent, to have vested the estate completely in itself or its grantee. But it has not so done, and its own inchoate title (and of course the derivative title, if any, of its grantee) has by the operation of the treaty become ineffectual and void.

It becomes unnecessary to consider the argument as to [*628] the effect of the death of Denny Fairfax pending the *suit, because, admitting it to be correctly applied in general, the treaty of 1794 completely avoids it. The heirs of Denny Fairfax were made capable in law to take from him by descent, and the freehold was not, therefore, on his death, cast upon the commonwealth.

On the whole, the court are of opinion that the judgment of the court of appeals of Virginia ought to be reversed, and that the judgment of the district court of Winchester be affirmed, with costs, &c.

JOHNSON, J. After the maturest investigation of this case that circumstances would permit me to make, I am obliged to dissent from the opinion of the majority of my brethren.

The material questions are —

1st. Whether an alien can take lands as a devisee, and if he can,

2d. Whether an inquest of office was indispensably necessary to devest him of his interest for the benefit of the State?

3d. Whether the disabilty of the devisee was not cured by the treaty of peace, or the treaty of 1794.

With regard to the treaty of peace, it is very clear to me that that

does not affect the case. The words of the fourth article are: "There shall be no future confiscations made, nor any prosecution commenced against any person or persons for or by reason of the part which he or they may have taken in the present war."

Now should we admit, as has been strongly insisted, that to escheat is to confiscate, it would still remain to show that this was "a confiscation on account of the part taken by the devisee in the war of the Revolution." But the disability of an alien to hold real estate is the result of a general principle of the common law, and was in no wise attached to the individual on account of his conduct in the revolutionary struggle. The alien who had taken part with this country, and *fought the battles of the States, may [*629] have been affected by it no less than he who fought against us, and the member of any other community in the world may as well have been the object of its application as the subject of Great Britain. The object evidently was to secure the individual from legal punishment — not to cure a legal disability existing in him.

With regard to the bearing of the treaty of 1794 on the interests of the parties, the only difficulty arises from the vague signification of the words, "now holding," made use of in the article which relates to this subject. But in conformity with the liberal spirit in which national contracts ought to be construed, I am satisfied to consider that treaty as extending to all cases "of a rightful possession or legal title, defeasible only on the ground of alien disability, and existing at the date of that treaty."

What, then, were the rights of the devisee in this case? and were they in existence at the date of this treaty?

Whoever looks into the learning on the capacity of an alien to take lands as devisee, will find it involved in some difficulties. There is no decided case, that I know of, upon the subject. And the opinions of learned men upon it, when compared, will be found to have been expressed with doubt, or scarcely reconcilable to each other. The general rule is, that an alien may take by purchase, but cannot hold. Yet so fragile or flimsy is the right he acquires, that, if tortiously dispossessed, no one contends that he can maintain an action against the evictor. To assert that he has a right, and yet admit that he has no remedy, appears to me rather paradoxical. Yet all admit that the bailiff of the king cannot enter on an alien purchaser until office found. But where a freehold is cast upon the alien by act of law, as by descent, dower, curtesy, &c., it is admitted that no inquest of office is necessary to vest the estate in the king, and he may enter immediately. Whether an alien devisee is to be considered as a purchaser, according to the meaning of that term, as

applied to an alien, or whether his estate is to be considered as one of those which are cast on him by operation of law, is an alternative, either branch of which may be laid hold of with some confidence. Chief Baron Gilbert asserts, without reservation, that a devise to an alien is void. (Gilbert on Devises, p. 15.) But Mr. Powell maintains that he takes under it as a purchaser. (Powell on Devises, 317.) In support of Gilbert's opinion, it might be urged that a devise takes effect under statute, and in that view the interest may be said to be cast on the alien by operation of law. Yet I have no hesitation in deciding in favor of the doctrine, as laid down by Powell. Not on the words of Lord Hardwicke, as quoted from Knight and Du Plessis; for the judge there expressly declines giving an opinion; but from a reference to the principle upon which the doctrine is certainly founded.

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The only unexceptionable reason that can be assigned, why an alien can take by deed, though he cannot hold, is, that otherwise the proprietor would be restricted in his choice of an alienee; or in other words, in his right of alienation. And to declare such a conveyance null and void would be attended with this absurdity, that the estate would still remain in the alienor in opposition to his own will and contract. It would, therefore, seem that the law on this subject would be more satisfactorily expressed by asserting that an alien is a competent party to a contract, so that a conveyance, executed to him, shall divest the feoffer or donor, in order that it may escheat. The tendency of this doctrine to favor the royal prerogative of escheat, would no doubt secure to it a welcome reception, yet it is not too much to pronounce it reasonable in the abstract. This reason is as applicable to the case of a devise as of a contract, and in the technical application of the term purchaser, a devisee is included. But it is contended, that the grant to Lord Fairfax was a grant or cession of sovereign power, and, as such, was assumed by the State when it declared itself independent. Upon considering, as well the acts of the State, with regard to this property, as the acts of Lord Fairfax himself, there is reason to think that both acted under this impression. But to decide on this question, we must look into the deed of cession, and upon its construction the decision of this court must depend. And here, in every part of it, we find it divested of the chief attributes of sovereignty, not a power legislative, judicial, or executive given, and the words such as are adapted to convey an interest, but no jurisdiction. Some few royal prerogatives, it is true, are expressly conveyed, and these unquestionably must have accrued to the State upon the assertion of independence. But the interest in the soil remained to the grantee.

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So far, therefore, I feel no difficulty about sustaining the claim of the devisee. But did this interest remain in him at the time of the treaty of 1794?

I am of opinion it did not. The interest acquired under the devise was a mere *scintilla juris*, and that *scintilla* was extinguished by the grant of the State vesting this tract in the plaintiff in error. I will not say what would have been the effect of a more general grant. But this grant emanated under a law expressly relating to the lands of Lord Fairfax, authorizing them to be entered, surveyed, and granted. The only objection that can be set up to the validity of this grant is, that it was not preceded by an inquest of office. And the question then will be, whether it was not competent for the State to assert its rights over the alien's property, by any other means than an inquest of office. I am of opinion that it was. That the mere executive of the State could not have done it, I will readily admit; but what was there to restrict the supreme legislative power from dispensing with the inquest of office? In the case of Smith *v.* The State of Maryland, (6 Cranch, 286,) this court sustained a specific confiscation of lands under a law of the State, where there was neither conviction nor inquest of office. And in Great Britain, in the case of treason, an inquest of office is expressly dispensed with by the statute 33 H. VIII. c. 30. So that there is nothing mystical, nor any thing of indispensable obligation, in this inquest of office. It is, in Great Britain, a salutary restraint upon the exercise of arbitrary power by the crown, and affords the subject a simple and decent mode of contesting the claim of his sovereign; but the legislative power of that country certainly may assert, and has asserted, the right of dispensing with it, and I see no reason why it was not competent for the legislature of the State of Virginia to do the same.

Several collateral questions have arisen, in this case, on which, as I do not differ materially from my brethren, *I [*632] will only express my opinion in the briefest manner.

I am of opinion that, whenever the case, made out in the pleadings, does not, in law, sanction the judgment which has been given upon it, the error sufficiently appears upon the record to bring the case within the 25th section of the Judiciary Act.[1]

I am also of opinion that, whenever a case is brought up to this court under that section, the title of the parties litigant must necessarily be inquired into, and that such an inquiry must, in the nature of things, precede the consideration, how far the law, treaty, and so

[1] 1 Stats. at Large, 85.

forth, is applicable to it; otherwise, an appeal to this court would be worse than nugatory.

And that, in ejectment at least, if not in every possible case, the decision of this court must conform to the state of rights of the parties at the time of its own judgment: so that a treaty, although ratified subsequent to the decision of the court appealed from, becomes a part of the law of the case and must control our decision.

1 W. 304; 3 W. 594, 610; 8 W. 464; 3 P. 242; 14 P. 122, 353, 614; 16 P. 367; 5 H. 233.

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ABANDONMENT.

1. Where there is a complete taking at sea by a belligerent, and his possession continues to the time of the abandonment, there is a constructive total loss which justifies the abandonment, though the property be neutral. *Rhinelander* v. *Ins. Co. of Pennsylvania*, 9.
2. The state of the loss at the time of the abandonment fixes the rights of the parties, and the subsequent release of the vessel does not prevent the recovery as for a total loss. *Ib.*
3. The right to abandon depends on the actual state of the loss at the time of the abandonment, not upon the information concerning the loss then in the possession of the assured. *Marshall* v. *Delaware Ins. Co.* 70.
4. Though a capture, and possession under it, constitute a technical total loss, and justify an abandonment, yet the right to abandon is terminated by a final decree of restitution, though the decree had not been actually executed when the offer to abandon was made. *Ib.*
5. The seizure of the cargo, the vessel being at liberty to proceed, does not justify an abandonment of the vessel. *Alexander* v. *Baltimore Ins. Co.* 140.
6. Whether a certain state of facts, justifies the master in breaking up a voyage, and if so, whether the cause is a peril within the policy, are questions of law. *King* v. *Delaware Ins. Co.* 322.
7. The right to abandon exists during the detention under a capture, but it must be exercised within a reasonable time after notice of the loss. *Chesapeake Ins. Co.* v. *Stark*, 397.
8. What is a reasonable time is a question for a jury under the direction of the court. *Ib.* *Maryland Ins. Co.* v. *Ruden's Administrator*, 426. *Livingston* v. *Maryland Ins. Co.* 648.
9. The right to abandon may be kept in suspense by mutual consent. *Livingston* v. *Maryland Ins. Co.* 400.
10. If a voyage is abandoned by reason of fear of seizure founded on false information, no real cause for seizure existing, underwriters on freight are not liable. *King* v. *Delaware Ins. Co.* 322.
11. Underwriters upon cargo are not liable to the owner for freight, in case of abandonment. *Caze* v. *Baltimore Ins. Co.* 569.

12. A supercargo, after capture, acts for whom it may concern, and if an abandonment be duly made, he is the agent of the insurer. *Chesapeake Ins. Co.* v. *Stark*, 397.

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ABSENT DEFENDANT.

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ACCOUNT.

1. If a bill seeks to open a settled account and surcharge and falsify it, the complainant must show clearly the errors complained of, otherwise the settlement remains a bar. *Chappedelaine* v. *Decheneaux*, 114.
2. Where a complainant has a right to an account, the court may refer the cause, either with or without instructions, as to the principles upon which it is to be taken. *Field* v. *Holland*, 303.
3. An account-current sent by a foreign merchant to a merchant in this country, and not objected to for two years, is deemed an account stated, and throws the burden of proof upon him who received and kept it without objection. *Freeland* v. *Heron*, 490.

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The assignee of one share of a pending mercantile adventure, who makes an express promise to the managing partner to assume the liability to him of the assignor, on which the managing partner acts, by thereafter prosecuting the adventure, treating the assignee as his copartner, is liable to an action at law on such promise. *Clark's Executors* v. *Currington*, 546.

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The United States are not bound by the declarations of their agent, founded upon a mistake of fact, unless it clearly appear that the agent was acting within the scope of his authority, and was empowered in his capacity of agent to make such declaration. *Lee* v. *Munroe*, 572.

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ALIEN.

1. A person born in England before the year 1775, and who always resided there, and never was in the United States, is an alien, and could not, in the year 1793, take lands in Maryland by descent from a citizen of the United States. *Dawson's Lessee* v. *Godfrey*, 122.
2. An alien enemy may take lands in Virginia by devise, and hold the same until office found. *Fairfax's Devisee* v. *Hunter's Lessee*, 684.

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2. It is not error to allow an amendment of the date of the demise, in a declaration in ejectment. *Blackwell* v. *Patton*, 626.

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1. In admiralty an appeal suspends the sentence, and it is not *res judicata* until the final sentence of the appellate court is given. *Yeaton* v. *United States*, 263.
2. If the law, under which a sentence of forfeiture was inflicted, expire, or be absolutely repealed, after an appeal, and before sentence by the appellate court, the sentence must be reversed. *Ib.*
3. If the counsel for the appellant neglect to furnish the court with a statement of the points of the case, the appeal will be dismissed. *Schooner Catherine* v. *United States*, 468.

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2. If a contract under seal be partly performed, and the execution of the residue prevented by the defendant, assumpsit upon a *quantum meruit*, for the work actually done, will not lie. *Young* v. *Preston*, 86.

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1. An attorney at law, as such, has authority to submit the cause to arbitration. *Holker* v. *Parker*, 606.
2. But an attorney at law, merely as such, has no right, strictly speaking, to make a compromise for his client. *Ib.*

AUDITOR.

1. An order in an equity suit, made by consent, that two persons be appointed "auditors," to examine certain accounts, does not make them referees. *Field* v. *Holland*, 303.
2. Upon the report of auditors it was competent for the court, on exceptions filed, to look into the evidence in the cause, and to direct an issue, which it might afterwards revoke; and if without an express revocation the court proceed to find the facts, this amounts to an implied revocation. *Ib.*
3. It is not necessary to take exceptions to the report of auditors, if the errors appear upon the face of the report. *Himely* v. *Rose*, 277.

AWARD.

1. An award will not be set aside in equity on account of an omission by the arbitrators to act upon part of the matters submitted, unless that omission shall have injured the complainant. *Davy's Executors* v. *Faw*, 502.
2. When the price of land and not the question of title, is submitted, the submission and award need not be by deed. *Ib.*
3. An award is not void because it is in the alternative, and contingent, nor because one of the alternatives requires the party to do an act in conjunction with others, not parties to the award, and over whom he has no control. *Thornton* v. *Carson*, 681.

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1. Under the Bankrupt Act, (2 Stats. at Large, 19,) a debt due from a firm, of which the bankrupt was a member, dissolved before the bankruptcy, may be set off against a debt due to the bankrupt alone, in an action by his assignee. *Tucker* v. *Oxley*, 183.
2. In the distribution of a bankrupt's effects in this country, the United States are entitled to a preference, although the debt was contracted by a foreigner in a foreign country; and although the United States had proved their debt under the commission of bankruptcy, and had voted for an assignee. *Harrison* v. *Sterry*, 267.
3. The bankrupt law of a foreign country cannot operate a legal transfer of property in this country. *Ib.*

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BILLS OF EXCHANGE AND PROMISSORY NOTES.

1. To charge one who indorses a promissory note for the accommodation of the maker, a demand on the maker and notice to the indorser are necessary. *French's Executrix* v. *Bank of Columbia*, 48.

2. An accommodation indorser of a note negotiable in the Bank of Alexandria, is by force of the act of incorporation, liable to an action before the maker has been sued, and though he be solvent. *Yeaton* v. *Bank of Alexandria*, 189.

3. If a person write his name on a blank piece of paper, with the intent to have it operate as an indorsement of a negotiable note, to obtain a loan for the benefit of a friend, who is to sign as maker, and the note be written and signed, and the loan made on the faith of it, the signature operates as an indorsement, and binds the indorser. *Violett* v. *Patton*, 212.

4. Under the law of Virginia, an indorsee of a negotiable promissory note cannot maintain an action at law against his immediate indorser, without proof of insolvency of the maker, or of a suit against him, even if the maker resided out of the jurisdiction, and the indorser put his name on the note to give it credit with the plaintiff, and took security for his indemnity. *Dulany* v. *Hodgkin*, 285.

5. If a foreign bill be indorsed in Virginia, and duly protested for non-payment, the indorser is liable to an action for fifteen per cent. damages; his contract being governed by the law of the place where it was made. *Slacum* v. *Pomery*, 377.

6. A declaration against an indorser of a foreign bill, which does not allege notice of the protest, is bad, on error. *Ib.*

7. The mere possession of a promissory note by an indorsee, who has indorsed it to another, is not sufficient evidence of his right of action against his indorser, without a reassignment or receipt from the last indorsee. An indorsement "without recourse," is not evidence of money had and received by the indorser to the use of the indorsee. *Welch* v. *Lindo*, 496.

8. Under the law of Virginia, the holder of a negotiable promissory note may maintain a bill in equity against a remote indorser, to recover its contents. *Riddle* v. *Mandeville*, 281.

9. The right thus asserted, is the right of the indorsee who took the note from the defendant, and therefore any legal defence, valid as against such immediate indorsee of the defendant, is valid in equity as against the remote indorsee. *Ib.*

10. Although the consideration of a promissory note fail, by reason of the failure of the payee to perform his part of the agreement upon which it was given, yet if a new agreement as a substitute for the old one be entered into between the original parties to the note, this failure of the original consideration creates no equity in favor of the maker of the note against the indorsee, even in Virginia. *Young* v. *Grundy*, 666.

11. In an action in Virginia by the assignee of a negotiable promissory note against the maker, the latter may set off a negotiable note of the assignor which he held at the time of receiving notice of the assignment of his own note, although the note thus set off was not due at the time of the notice, but became due before the note upon which the suit was brought. *Stewart* v. *Anderson*, 371.

CONTRACT, 4. 5; COURTS OF THE UNITED STATES, 14; EVIDENCE, 9 – 11; INSURANCE, 9; PAYMENT, 3; PLEADING, 9.

BLOCKADE.

1. An intention to enter a blockaded port is not a breach of blockade; there must also be an attempt to enter, knowing the fact of blockade. *Fitzsimmon* v. *Newport Ins. Co.* 65.

2. Where orders had been given to the blockading force not to capture a vessel, unless previously warned not to enter, the master is not bound to make inquiries elsewhere,

but may sail for the port, expecting to inquire of the blockading squadron, if there. *Maryland Ins. Co.* v. *Woods*, 310.

3. Notice from the British government, that a blockade will not be considered as existing without an actual investment, and that vessels bound to an invested port will not be captured, unless previously warned off, justifies the master of an American vessel who has been warned off, but has, subsequently, reasonable ground to believe the blockade has ceased, in returning to make inquiry off the port, intending to proceed elsewhere if the blockade still continues. *Ib.* 592.

INSURANCE, 14–16, 20. 22; JUDGMENT, &c. 9.

BOND.

1. A bond cannot be delivered to one of the obligees as an escrow. *Moss* v. *Riddle*, 290.
2. If an appeal bond executed by the appellant and one surety be rejected by a justice of the peace, and afterwards, without the privity of the principal obligor, the bond is altered by interlining the name of another surety, who executes it, the plea of *non est factum*, by the principal obligor, is supported. *Oneal* v. *Long*, 18.
3. A bond in an action upon which it would be necessary to assign breaches, and call in a jury to assess damages, is not assignable, under the statute of Virginia. *Lewis* v. *Harwood*, 325.
4. If the obligee of a bond obtain titles in his own name for part of the lands, the assignment of which to the obligor was the consideration of the bond, and suffer the titles to the residue of the lands to be lost by the non-payment of taxes, a court of equity will not lend its aid to carry into effect a judgment at law upon the bond. *Skillern's Executors* v. *May's Executors*, 45.
5. If the original judgment be reversed, the reversal of the dependent judgment on the "forthcoming bond" follows, of course; but a special *certiorari* is necessary to bring up the execution upon which the bond was given, so as to show the connection between the two judgments. *Barton* v. *Petit*, 533.

COURTS OF THE UNITED STATES, 25; EQUITY, 7; PAYMENT, 1. 2; PLEADING, 2; WITNESS.

BOTTOMRY.

If the holder of a bottomry bond omits to enforce it, until the vessel has made another voyage, after the completion of the voyage mentioned in the bond, an execution levied on the vessel, before it has been arrested upon admiralty process to enforce the bond, displaces the bottomry lien. *Blaine* v. *Ship Charles Carter*, 125.

BRITISH DEBTS.

TREATY, 10.

CAPTURE.

ABANDONMENT, 1. 4. 5. 7. 10; COURTS OF THE UNITED STATES, 31; INSURANCE, 32. 36; INTEREST; INTERNATIONAL LAW, 7. 8–10; JUDGMENT, &c. 3. 6; PRIZE 4.

CITATION.

WRIT OF ERROR, 12. 15.

CITIZEN.

1. By an act of the 4th of October, 1776, the State of New Jersey asserted its right to the allegiance of all persons born, and then residing within the territory of the State, and as D. C. was there born, and continued to reside there until 1777, he was a citizen of the State. *M'Ilvaine* v. *Coxe's Lessee*, 74.

2. His leaving the State afterwards, and actually adhering to the side of the crown, did not render him an alien. *Ib.*
3. Nor did the treaty of peace of 1783 have that effect. *Ib.*

CONFLICT OF LAWS, 2; COURTS OF THE UNITED STATES, 8. 10. 11. 33; FORFEITURE, 4; INTERNATIONAL LAW, 13; NATURALIZATION.

CLERK.

COSTS, 4.

CONDEMNATION.

EVIDENCE, 12; FORFEITURE, 7. 8; INSURANCE, 21; JUDGMENT, &c., 3. 6; PRIZE, 3.

CONFISCATION.

1. The act of the State of Georgia confiscating the land of a mortgagor, did not destroy the estate of a mortgagee in the land. *Higginson* v. *Mein*, 155.
2. By the confiscation acts of Maryland, equitable interests were completely devested, by operation of law, without office found. *Smith* v. *Maryland*, 409.

CONFLICT OF LAWS.

1. The title to land can be acquired and lost only in the manner prescribed by the law of the place where such land is situate. *United States* v. *Crosby*, 477.
2. A Spanish subject, who came here in time of peace to carry on trade, and remains here, engaged in trade, after a war began between Spain and Great Britain, is to be deemed an American merchant, although the trade in which he was engaged could be carried on only by a Spanish subject, by the law of Spain. *Livingston* v. *Maryland Ins. Co.* 648.

BANKRUPT, 3; BILLS OF EXCHANGE, &c. 5.

CONSIDERATION.

INSURANCE, 9.

CONSTITUTIONAL LAW.

1. Before a law can be pronounced unconstitutional, its incompatibility with the constitution must be clear. *Fletcher* v. *Peck*, 328.
2. By the constitution of Georgia, of 1789, the legislature had power to dispose of the unappropriated lands within its limits. *Ib.*
3. If a legislature make a grant of lands in fee simple, a subsequent legislature cannot take away the title of a *bonâ fide* purchaser for a valuable consideration from the first grantee, upon the ground that the grant to the latter was fraudulent. *Ib.*
4. When a law is a contract, a repeal of that law cannot take away rights vested under that contract. *Ib.*
5. A grant, made in pursuance of a contract, is an executed contract, and its obligations cannot be impaired by a law of a State. *Ib.*
6. A grant implies a contract by the grantor, not to reassert the title granted. *Ib.*
7. Contracts made by a State, are within the constitution of the United States. *Ib.*
8. The lands in question, in this case, did belong to the State of Georgia, and not to Carolina, or the United States. *Ib.*
9. An unextinguished Indian title to these lands, was not absolutely inconsistent with a seisin in fee by the State. *Ib.*
10. A legislative act, passed in consideration of a release of title by the Indians, declaring that certain lands which should be purchased for the Indians should not, thereafter, be subject to any tax, constituted a contract, which could not be rescinded by a subsequent legislative act; such repealing act being void under that clause of the constitution of the United States, which prohibits a State from passing any law impairing the obligation of contracts. *New Jersey* v. *Wilson*, 498.

CONTINUANCE.

WRIT OF ERROR, 6. 7.

CONTRACT.

1. A simple contract is not merged in a sealed instrument, which merely recognizes the debt, and fixes the mode of ascertaining its amount. *Bank of Columbia* v. *Patterson's Administrators*, 540.
2. The recital of a prior, in a later agreement, after it has been executed, does not extinguish the former. *Ib.*
3. A stipulation in a contract of sale of land, that if the purchaser fail to comply with the terms of sale within thirty days, the land shall then be sold for account of the purchaser, gives him a right to such resale, and if not made, no action for damages lies against him. *Webster* v. *Hoban*, 591.
4. The defendants having ordered the plaintiff to purchase salt for them, and to draw on them for the amount, and he having so purchased and drawn, they are bound to accept and pay his bills; and if they do not, he may recover from them the amount of the bills and damages and costs of protest (if he has paid the same) upon a count for money paid, laid out, and expended, and the bills of exchange may be given in evidence on that count. *Riggs* v. *Lindsay*, 643.
5. If, after the protest of the bills, the plaintiff sell the salt without orders, it shall not prejudice his right of action, although he render no account of sales to the defendants. *Ib.*

ASSUMPSIT; CONSTITUTIONAL LAW, 3–7. 10; CORPORATION; DISTRICT OF COLUMBIA, 3; EVIDENCE, 1. 18; PLEADING, 10.

CORPORATION.

Wherever a corporation aggregate is acting within the scope of the legitimate purposes of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises, for the enforcement of which an action lies. *Bank of Columbia* v. *Patterson's Administrator*, 540.

COURTS OF THE UNITED STATES, 8. 9; INSURANCE, 38. 40.

COSTS.

1. If a judgment is reversed for want of jurisdiction, costs are not given. *Montalet* v. *Murray*, 14.
2. The court below, upon a mandate on reversal of its judgment, may award execution for the costs of the appellant in that court. *Riddle* v. *Mandeville*, 327.
3. In all cases of reversal, if this court direct the court below to enter judgment for the plaintiff in error, the court below will, of course, enter the judgment with the costs of that court. *M'Knight* v. *Craig's Administrator*, 359.
4. Each party is liable to the clerk of this court for the fees due to him from each party respectively. *Caldwell* v. *Jackson*, 527.

COURTS OF THE UNITED STATES.

1. The court of appeals established by the continental congress, had power to reverse the sentence of a state court of admiralty. *United States* v. *Peters*, 206.
2. The courts of the United States have no common law jurisdiction in cases of libel against the government of the United States. *United States* v. *Hudson*, 445.
3. But they have the power to fine for contempts, to imprison for contumacy, and to enforce the observance of their orders. *Ib.*
4. A court of the United States cannot enjoin proceedings in a state court. *Diggs* v. *Wolcott*, 63.
5. The fact that a State has an interest in the subject-matter of a suit between indi-

viduals, which it may choose to assert, does not oust the courts of the United States of jurisdiction. *United States* v. *Peters*, 206.

6. If such an interest is suggested as would make the State a necessary party, the suggestion must be examined, and its correctness determined by the court. *Ib.*
7. An act of a state legislature cannot determine whether a court of the United States has jurisdiction. *Ib.*
8. Whether a corporation aggregate can be sued in the courts of the United States depends upon the citizenship of its members. *Hope Insurance Company* v. *Boardman*, 200. *Bank of the United States* v. *Deveaux*, 194.
9. The charter of the Bank of the United States does not enable that bank to sue in the courts of the United States. *Bank of the United States* v. *Deveaux*, 194.
10. The courts of the United States have jurisdiction in a case between citizens of the same State, if the plaintiffs are only nominal plaintiffs for the use of an alien. *Browne* v. *Strode*, 273.
11. Although the plaintiff be described in the proceedings as an alien, yet the defendant must be expressly stated to be a citizen of some one of the United States. Otherwise, the courts of the United States have not jurisdiction in the case. *Hodgson* v. *Bowerbank*, 273.
12. The courts of the United States have not jurisdiction between aliens. *Montalet* v. *Murray*, 14. *Morgan* v. *Callender*, 139.
13. It must appear upon the record that the character of the parties supports the jurisdiction. *Ib.* And where the record did not show that the court below had jurisdiction, the decree of that court for the complainants was reversed. *Wallen* v. *Williams*, 683.
14. Under the 11th section of the Judiciary Act, (1 Stats. at Large, 78,) if the payee and maker of a promissory note were both aliens, the indorsee cannot sue in the courts of the United States. *Montalet* v. *Murray*, 14.
15. A general assignee of the effects of an insolvent cannot sue in the federal courts, if his assignor could not have sued in those courts. *Sere* v. *Pitot*, 428.
16. The affirmative description of the appellate power of the supreme court, contained in the Judiciary Act, implies a negative on the exercise of such appellate power as is not comprehended within it. *Durousseau* v. *United States*, 412.
17. But it is not necessary the appellate jurisdiction should be expressly given by an act of congress; it is enough, if an intent to allow it to exist, under the constitution, in a particular case, can be ascertained. *Ib.*
18. An appeal from the district court of the district of Maine, in a case of admiralty jurisdiction, does not lie directly to the supreme court of the United States, but to the circuit court for the district of Massachusetts. *Sloop Sally* v. *United States*, 299.
19. Under the act of March 26, 1804, (2 Stats. at Large, 285, s. 8,) this court had appellate jurisdiction, by writ of error to the district court of the territory of Orleans. *Durousseau* v. *United States*, 412; *Morgan* v. *Callender*, 139.
20. Under the 14th section of the Judiciary Act, (1 Stats. at Large, 81,) this court has power to issue a writ of *habeas corpus* to examine into the cause of a commitment by the circuit court for the District of Columbia. *Ex parte Bollman, and Ex parte Swartwout*, 23.
21. It is the revision of a decision of an inferior court, confining a person for trial, and therefore is the exercise of appellate jurisdiction. *Ib.*
22. The construction of a treaty is drawn in question when the inquiry is whether, under the laws of a State, such a title existed as the treaty protects, although the only difficulty of that inquiry consists in the interpretation of the state laws and their application to the case. *Smith* v. *Maryland*, 409.
23. In such a case, the supreme court has jurisdiction under the 25th section of the Judiciary Act, (1 Stats. at Large, 85.) *Ib.*

24. If a defendant in ejectment sets up an outstanding title in a third person, under whom he does not claim, and the validity of this title depends upon the effect of a treaty, this is not "a case arising under a treaty," of which this court has jurisdiction, under the 25th section of the Judiciary Act, (1 Stats. at Large, 85.) *Owings* v. *Norwood's Lessee*, 288.

25. In deciding whether the matter in dispute be sufficient to sustain the jurisdiction of this court, it will look to the sum alleged by the obligee to be due upon the condition of the bond, and not to the penalty. *United States* v. *M'Dowell*, 120.

26. Under the 25th section of the Judiciary Act, (1 Stats. at Large, 85,) this court has jurisdiction of a question respecting title to land, both parties claiming under the same act of congress. *Matthews* v. *Zane*, 148.

27. A circuit court may be holden by a district judge, though there is no judge of the supreme court assigned to that circuit. *Pollard* v. *Dwight*, 158.

28. In all cases where the district court of Maine acts as a district court, the appeal is to the circuit court for the district of Massachusetts. *Sloop Sally* v. *United States*, 299.

29. The circuit court has jurisdiction in a suit in equity, to stay proceedings upon a judgment at law between the same parties, although the subpœna be served upon the defendant, out of the district in which the court sits. *Logan* v. *Patrick*, 266.

30. A state court has no jurisdiction to enjoin a judgment of a circuit court of the United States. *M'Kim* v. *Voorhies*, 529.

31. The district courts have admiralty jurisdiction of all seizures made on waters navigable from the sea, by vessels of ten or more tons burden. *United States* v. *Schooner Betsey and Charlotte*, 170.

32. The district court of that district in which a seizure is made on land, has jurisdiction to try the question of forfeiture, under the 9th section of the Judiciary Act, (1 Stats. at Large, 77.) *Keene* v. *United States*, 274.

33. The citizens of the territory of Orleans may sue and be sued in the district court of that territory in the same cases in which a citizen of Kentucky may sue and be sued in the court of Kentucky. *Sere* v. *Pitot*, 423.

MANDAMUS; WRIT OF ERROR, 2, 3. 10.

COVENANT.

1. A covenant of lawful seisin may be broken without an ouster. *Pollard* v. *Dwight*, 158.

2. Such a covenant is not broken because the title of the grantor was under a patent voidable by the State, but not avoided. *Ib.*

3. The return of the state surveyor, under his oath, cannot be invalidated, in an action on a covenant of seisin, by evidence tending to show that he did not in fact make the survey, which he returned. *Ib.*

4. Parol evidence that there were prior claims on the land is not admissible. *Ib.*

INSURANCE, 12; PLEADING, 5–7.

CUSTOM AND USAGE.

EVIDENCE, 8.

DAMAGES.

BILLS OF EXCHANGE, &c., 5; CONTRACT, 3. 4; PAYMENT, 2; PRIZE, 4.

DEBTOR AND CREDITOR.

1. Where a trust was created to pay to W. the amount that shall be recovered and paid from him to N. upon account of a letter of credit, and N. had recovered a judgment at law against W. which was unsatisfied, W., being insolvent, it was held

that N. could not, by a bill against the trustee and W., reach the trust fund. *Russell* v. *Clark's Executors*, 459.

2. But if the money is to be paid at all events, the person who is ultimately to receive it, under a trust, may sustain such a bill. *Ib.*

ABSENT DEFENDANT; DEED, 4; DEFENDANT; JOINT DEFENDANT; SLAVE.

DECREE.

JUDGMENT, &c.

DEED.

1. If the monuments called for in a deed are uncertain, the courses and distances may identify them, or may dispense with the necessity of identifying some of them, by rendering the whole description, taken together, sufficiently certain. *Marshall* v. *Currie*, 58.
2. A deed purporting to secure the repayment of 30,000*l.*, may stand as security for the repayment of part of that sum and the indemnity of the mortgagee from liabilities, if there be no fraudulent intent. *Shirras* v. *Caig*, 447.
3. The law of Georgia only requiring a deed to be recorded within twelve months from its date, subsequent purchasers cannot complain if the deed be recorded within that time. *Ib.*
4. Where a statute declared that all conveyances, not acknowledged and recorded, should be valid as between the parties and their heirs, but void as to all creditors and subsequent purchasers, it was held, that only creditors and purchasers of the grantor, were intended; and that creditors of the husband, could not claim property of the wife, settled on her by an ante-nuptial deed, not recorded. *Pierce* v. *Turner*, 216.
5. A judge of the supreme court of Pennsylvania, is competent to take an acknowledgment of a deed of lands under the statute of 1715 of that State. *M'Keen* v. *DeLancey's Lessee*, 181.
6. If the deed convey lands in two counties, recording it in one of them, is sufficient under that statute. *Ib.*
7. The admission of a deed to be registered, does not preclude an examination into the evidence upon which it was admitted; and if found not to conform to the requisitions of law the registration is void. *Blackwell* v. *Patton*, 626.
8. Under the act of the State of Tennessee, of November 23, 1809, a deed, proved by one of the subscribing witnesses before a judge of a court of another State, where the grantor resided, and made the deed, and registered in the county where the land lay, was valid. *Ib.*

AWARD 2; EVIDENCE, 22–25; PLEADING, 8.

DEMURRER.

On a demurrer to evidence, judgment will be given against the party demurring, if upon the evidence it would have been competent for a jury to have found a verdict against him, though the court may, on the whole, be of opinion that a verdict in his favor would have been more satisfactory. *Pawling* v. *United States*, 81.

PRACTICE 8. 9; WRIT OF ERROR, 9.

DEPOSITION.

EVIDENCE, 14. 15; PRACTICE, 2.

DESCENT AND DISTRIBUTION.

The statute of descents in Maryland has not declared how an intestate estate shall descend, which was derived to the intestate from his half brother, or from his brother

of the whole blood, or from his son or daughter, or from his wife; but such estates are left to descend as at common law. *Barnitz's Lessee* v. *Casey*, 618.

ALIEN, 1.

DEVIATION.

INSURANCE, 1 – 8; 33 – 36.

DEVISE.

A devise to A in fee, and if he shall die under the age of twenty-one years, and without issue, then to B in fee, is a good executory devise; and if B die before the contingency happen, it devolves upon his heir, and so from heir to heir until the contingency happen, when it vests absolutely in him only who can then make himself heir to B the executory devisee. And although A be the heir at law of B, yet the executory devise thus devolving on him, is not merged in the precedent estate, but on the death of A devolves to the next heir of B. *Barnitz's Lessee* v. *Casey*, 618.

ALIEN, 2; DOWER, 1.

DISCONTINUANCE.

If the plaintiff discontinue as to one count, the rights of the parties under the other counts are unaffected. *Hughes* v. *Moore*, 506.

DISCOVERY.

EQUITY, 8.

DISTRICT OF COLUMBIA.

1. The act of February 27, 1801, sec. 8, (2 Stats. at Large, 106,) gives a writ of error to the circuit court for the District of Columbia, though in the particular case all right of appeal had been taken away by the legislation of the State of Virginia. *Young* v. *Bank of Alexandria*, 149.
2. Upon a writ of error to the circuit court for the District of Columbia, this court has no jurisdiction, if the sum awarded be less than $100, although a greater sum may have been originally claimed. *Wise* v. *The Columbian Turnpike Company*, 526.
3. The separation of Alexandria from Virginia did not affect existing contracts between individuals. *Korn* v. *The Mutual Assurance Society*, 364.
4. The insurance upon buildings in Alexandria did not cease by the separation, although the company could only insure houses in Virginia. *Ib.*

COURTS OF THE UNITED STATES, 20. 21; WRIT OF ERROR, 10.

DOWER.

1. If a devise of land in Virginia to the widow, appear from circumstances to be intended in lieu of dower, she must make her election, and cannot take both. *Herbert* v. *Wren*, 575.
2. If a wife join her husband in a lease for years, she is still entitled to dower in the rent. *Ib.*
3. A court of chancery cannot allow a part of the purchase-money in lieu of dower, when the estate is sold, unless by consent of all parties interested. *Ib.*
4. Courts of chancery have concurrent jurisdiction with courts of law, in cases of dower, especially where partition, discovery, or account is prayed, and in cases of sale where the plaintiff is willing that a sum in gross should be given in lieu of dower. *Ib.*

EJECTMENT.

AMENDMENT, 2; COURTS OF THE UNITED STATES, 24; JOINT TENANTS, &c. 1. 2.

EMBARGO.

1. An embargo bond, conditioned to land a cargo at some port in the United States, "dangers of the seas excepted," is not forfeited, if the vessel be forced by stress of weather to put away for a foreign port, and the cargo is there landed by an order of the local government. *United States* v. *Hall*, 355.

2. An effect, which is an inevitable consequence of a peril of the sea, must be ascribed to that as its cause. *Ib.*

3. If a vessel go to an interdicted port, it is incumbent on the claimant to excuse the *primâ facie* breach of the law, by proving clearly the necessity for doing so. *Brig James, Wells* v. *United States*, 440.

4. Under the 3d section of the Embargo Act of January 9, 1808, (2 Stats. at Large, 453,) a mere transhipment of cargo from one vessel to another, in a port of the United States, did not work a forfeiture. *Schooner Paulina's Cargo* v. *United States*, 452.

5. The 2d section of the Embargo Act of April 25, 1808, (2 Stats. at Large, 499,) only decrees a clearance, but does not inflict any forfeiture. *Ib.*

6. Under the Embargo Act of January 9, 1808, (2 Stats. at Large, 453, s. 3,) a departure from port without a clearance is necessary to consummate the offence. *Sloop Active* v. *United States*, 469.

7. Sailing within the port, with intent to depart, is not sufficient. *Ib.*

8. Under the Embargo Act of January 9, 1808, (2 Stats. at Large, 453, s. 3,) the offence was not complete until the arrival of the vessel at a foreign port. But on her return, the vessel was liable to seizure. *United States* v. *Brig Eliza*, 476.

9. Upon an indictment for putting goods on board a carriage, with intent to transport them out of the United States, contrary to the act of January 9, 1809, (2 Stats. at Large, 506,) the punishment of which offence is a fine of four times the value of the goods, it is not necessary that the jury should find the value of the goods. *United States* v. *Tyler*, 531.

10. A vessel of the United States, captured, condemned, sold, purchased by her former master, a citizen of the United States, who obtained a Danish burgher's brief, and who cleared out of a port of the United States as a Dane, is a foreign vessel within the 5th section of the act of 9th of January, 1808, (2 Stats. at Large, 454,) although she was really owned by a citizen of the United States. *Schooner Good Catharine* v. *United States*, 564.

11. By the 11th section of the act of 25th April, 1808, (2 Stats. at Large, 501,) the collector had no right to detain a vessel and cargo after her arrival at her port of destination, under a suspicion that she intended to violate the embargo. *Otis* v. *Bacon*, 677.

12. The act of March 12, 1808, (2 Stats. at Large, 473,) does not inflict a forfeiture, if the vessel was forced by stress of weather into an interdicted port. *Durousseau* v. *United States*, 412.

EQUITY.

1. He who has equal equity, may acquire the legal estate, if he can, so as to protect his equity. *Fitzsimmons* v. *Ogden*, 432.

2. If an equitable title be merged in a grant, the party has no relief in equity. *Preston* v. *Tremble*, 567.

3. In a case of fraud, trust, or contract, the jurisdiction of a court of equity is sustainable, wherever the person is found, though the decree may affect lands without its jurisdiction. *Massie* v. *Watts*, 345.

4. Any fact, which clearly proves it to be against conscience to execute a judgment at law, of which the complainant could not have availed himself in a court of law, or which he was prevented from availing himself of, by fraud, or accident, unmixed with any fault or negligence of himself, or his agent, will induce a court of equity to enjoin the judgment. *Marine Insurance Co. of Alexandria* v. *Hodgson*, 557.
5. But a legal defence, actually made at law, is not ground for a bill, though the court may be of opinion it ought to have prevailed. *Ib.*
6. If the answer neither admits nor denies the allegations of the bill, they must be proved on the final hearing; but upon a question of dissolution of an injunction they are to be taken to be true. *Young* v. *Grundy*, 317.
7. If a bond, executed in performance of articles, depart therefrom by mistake, equity will relieve, but such departure must be clearly shown. *Finley* v. *Lynn*, 386.
8. If a court of equity has jurisdiction to compel a discovery, it may go on and give relief, though the claim be legal; but it will not do so, if no material discovery is made by the answer. *Russell* v. *Clark's Executors*, 459.
9. A court of equity will not interfere between a donee of land by deed, and a devisee under a will of the donor, in a case where there is no fraud. *Viers* v. *Montgomery*, 61.
10. The purchaser of an equitable interest takes subject to every existing equity. *Shirras* v. *Caig*, 447.

ACCOUNT, 1. 2; AWARD, 1; BILLS OF EXCHANGE, &c., 8–10; BOND, 4; CONFISCATION, 2; COURTS OF THE UNITED STATES, 29; DEBTOR AND CREDITOR; DOWER, 3. 4; FOREIGN ATTACHMENT; PLEADING; PUBLIC LANDS, 6. 10. 12; SPECIFIC PERFORMANCE.

ESCROW.

BOND, 1.

ESTOPPEL.

STATUTES, 9.

EVIDENCE.

1. Hearsay evidence is incompetent to establish a specific fact, which is, in its nature, susceptible of being proved by witnesses who speak from their own knowledge. Claims to freedom in Maryland are not exempt from that general rule. *Mima Queen* v. *Hepburn*, 535.
2. Parol evidence, that one set of written instructions superseded another, cannot be given. *Dunlop* v. *Munroe*, 522.
3. The usage of trade may be proved by parol, although such usage originated in a law or edict of the government of the country. *Livingston* v. *Maryland Ins. Co.*, 648.
4. If foreign laws and regulations respecting trade be not proved to have been in writing as public edicts, they may be proved by parol. *Ib.* 400.
5. In an action upon a valued policy, it is not competent for the underwriters to give parol evidence that the real value of the subject insured is different from that stated in the policy. *Marine Ins. Co. of Alexandria* v. *Hodgson*, 373.
6. If one defendant produce in evidence a letter from his codefendant to the plaintiff, the latter may give in evidence the written declarations of that codefendant to discredit the letter. *Riggs* v. *Lindsay*, 643.
7. Upon general counts, a special agreement executed may be given in evidence. *Bank of Columbia* v. *Patterson's Administrator*, 540.
8. Upon the issue of *non-assumpsit*, the defendant may give in evidence the record of a former judgment between the same parties on the same cause of action. *Young* v. *Black*, 669.

9. A note payable at sixty days, cannot be given in evidence to support a count upon a note, which count does not state when the note was payable. The variance is fatal. *Sheehy* v. *Mandeville*, 514.

10. Upon executing a writ of inquiry in Virginia, in an action of assumpsit upon a promissory note, it is necessary to produce a note corresponding with that declared on, but it is not necessary to prove the signature. *Ib.*

11. The plaintiff cannot give evidence that the variance was the effect of mistake or inadvertence of the attorney, and that the note produced was that which was intended to be described in the declaration. *Ib.*

12. In order to prove the condemnation of a vessel it is only necessary to produce the libel and sentence. *Marine Ins. Co. of Alexandria* v. *Hodgson*, 378.

13. It is a useless practice to read the proceedings at length. *Ib.*

14. The depositions stated in such proceedings are not evidence in an action upon the policy of insurance. *Ib.*

15. The plaintiff may read depositions taken by the defendant. *Yeaton* v. *Fry*, 285.

16. Due diligence to find a subscribing witness must be shown, before evidence of his handwriting is admitted. *Cooke* v. *Woodrow*, 177.

17. An acknowledgment that payment of a less sum than that secured by a bond, is in full satisfaction of all claims, is evidence that only that balance remained due, in consequence of prior payments. *Henderson* v. *Moore*, 176.

18. A letter of credit, addressed to John and Joseph Naylor & Co., will not support an action by John and Jeremiah Naylor & Co.; and the plaintiffs cannot be allowed to prove by parol, that the letter was intended to be addressed to their firm, and that the variance arose from mistake. *Grant* v. *Naylor*, 84.

19. Though an appraisement, made by order of court, is not conclusive evidence of the amount in dispute in an admiralty case, yet it is generally the best evidence. *United States* v. *Brig Union*, 80.

20. Copies of the proceedings of a foreign court of admiralty, may be authenticated by the seal of the court and the attestation of the deputy registrar, and the certificate of the judge under his hand and the seal of the court, attesting the seal, and the fact that the person signing is registrar; and the certificate and seal of the secretary and notary of the island, proving that the person signing as judge, holds that office. *Yeaton* v. *Fry*, 285.

21. Such proof is in conformity with the law, and also with the 19th article of the treaty of 1794, with Great Britain. *Ib.*

22. After a long possession in severalty, a deed of partition may be presumed. *Hepburn* v. *Auld*, 251.

23. This court will grant a commission to take new evidence to be used here, in a case of admiralty jurisdiction. *Hawthorne* v. *United States*, 471.

24. In a prosecution against a vessel, for violation of a law of the United States, it is not necessary to adduce positive testimony of the identity of the vessel. It is sufficient if the circumstances fully satisfy the judicial mind, of the fact charged. *Schooner Jane* v. *United States*, 570.

25. A recital in the defendant's deed, that the plaintiff and others had paid the defendant's debt, the repayment of which the defendant desired to secure to him, is evidence from which the jury may infer that the payment was at the defendant's request, and is also sufficient to take the debt out of the Statute of Limitations. *King* v. *Riddle*, 500.

26. A bill of lading, stating the property to belong to A and B, is not conclusive evidence, and does not estop A from showing the property to belong to another. *Maryland Ins. Co.* v. *Ruden's Administrator*, 427.

ACCOUNT, 3; BILLS OF EXCHANGE, &c., 7; CONTRACT, 4; COVENANT, 3. 4; EQUITY, 6; EXECUTORS AND ADMINISTRATORS, 3; INSURANCE, 21. 34; INTER-

NATIONAL LAW, 3; JUDGMENT, &c., 7-10; NEW TRIAL, 2; PAYMENT, 9; POSTMASTER, 1; PUBLIC LAWS, 7; RECORD; SALE; SLAVE, 1.

EXCEPTIONS.

1. A misdirection contained in the charge of the judge, is a subject of a bill of exceptions. *Smith* v. *Carrington*, 19.
2. A bill of exceptions ought to state that evidence was offered of the facts upon which the opinion of the court was prayed. *Vasse* v. *Smith*, 379.
3. When the error assigned is the refusal of the court to give a particular direction to the jury, the direction must be so perfectly stated, as to be proper to be given as stated. *Violett* v. *Patton*, 212.

AUDITOR, 3.

EXECUTION.

1. This court will not quash an execution issued by the court below to enforce its decree pending the writ of error, if the writ of error be not a *supersedeas* as to the decree. *Wallen* v. *Williams*, 528.
2. An execution issued by a circuit court before the expiration of ten days after judgment, in a case open to a writ of error, is not void, and the marshal may justify under it; if voidable the remedy is to apply to the court to set it aside. *Blaine* v. *The Ship Charles Carter*, 125.

BOND, 5; BOTTOMRY; COSTS, 2.

EXECUTORS AND ADMINISTRATORS.

1. Upon the issue of *plene administravit*, the jury must find specially, the amount of assets in the hands of the executor, otherwise the court cannot render judgment upon the verdict. *Fairfax's Executor* v. *Fairfax*, 179.
2. In Virginia, if the defendant die after interlocutory judgment and a writ of inquiry awarded, his administrator, upon *scire facias*, can only plead what his intestate could have pleaded. *M'Knight* v. *Craig's Administrator*, 359.
3. A final account settled by an administrator with the orphans' court, is not conclusive evidence in his favor upon the issue of *devastavit vel non*. *Beatty* v. *Maryland*, 529.

FEES.

COSTS, 4; JURY, 8.

FOREIGN ATTACHMENT.

1. The service of a chancery attachment prevents the garnishee from legally parting with money in his hands. *Kennedy* v. *Brent*, 361.
2. A foreign attachment in chancery is, as against the debtor, an action at law, and he may plead the statute of limitations without the support of an answer. *Wilson* v. *Koontz*, 512.

APPEARANCE.

FOREIGN LAWS.

EVIDENCE, 3. 4.

FORFEITURE.

1. It is a general principle that a law of forfeiture can be applied only to those cases in which the means prescribed for the prevention of a forfeiture can be employed. *Peisch* v. *Ware*, 132.
2. A libel for a forfeiture must be particular and certain in all the material circumstances which constitute the offence. *Brig Caroline* v. *United States*, 641.
3. If a sentence of forfeiture be reversed for a defective libel, the cause will be remanded to the circuit court, with directions to allow an amendment. *Ib.*
4. If one act inflict a forfeiture, and a subsequent act provides that it shall not be inflicted if the property belonged to a citizen, it is not necessary to aver in the libel that the ownership was not in a citizen; it is matter of defence. *Brig Aurora* v. *United States*, 583.

5. If an act inflict a forfeiture of a vessel for importation therein of certain articles, laden on board with intent to be imported into the United States, and with the knowledge of the master or owner of the vessel, this intent and knowledge are substantive parts of the offence, and must be averred in a libel of information in the admiralty. *Schooner Hoppet* v. *United States*, 585.
6. A statement of the offence, with that substantial certainty demanded by our free institutions, must be required in every court where justice is the object, and is not rendered unnecessary by a reference to the penal statute and a general allegation that it was violated. *Ib.*
7. No sentence of condemnation can be affirmed if the law under which the forfeiture accrued has expired, although a condemnation and sale had taken place, and the money had been paid over to the United States, before the expiration of the law. *Schooner Rachel* v. *United States*, 421.
8. This court, in reversing the sentence, will not order the money to be repaid, but will award restitution of the property, as if no sale had been made. *Ib.*

APPEAL, 2; COURTS OF THE UNITED STATES, 32; EMBARGO, 1–5. 12; JUDGMENT, &c. 2; REVENUE LAWS, 4. 8–10; SHIPPING, 2; STATUTES, 4.

FRAUD.

1. Fraud consists in intention; and that intention is a fact which must be averred in a plea of fraud. *Moss* v. *Riddle*, 290.
2. A magistrate who has received a deed of trust from an insolvent debtor, which deed is fraudulent in law, as to creditors, is incompetent to sit as a magistrate in the discharge of the debtor under the insolvent law of Virginia. *Slacum* v. *Simms*, 295.
3. And the discharge so obtained is not a discharge in due course of law. *Ib.*
4. If a representation concerning the credit of another is honestly made, its actual falsehood does not render the person making it liable to an action. *Russell* v. *Clark's Executors*, 459.

SLAVE, 8.

FRAUDS, STATUTE OF.

A promise to pay a sum of money, in consideration of the release of an equitable title, is within the statute of frauds. *Hughes* v. *Moore*, 506.

FREIGHT.

ABANDONMENT, 10. 11; SHIPPING, 8.

GIFT.

SLAVE, 1.

GRANT.

CONSTITUTIONAL LAWS, 3. 5. 6; PUBLIC LANDS, 21.

GUARANTEE.

To subject one man to pay the debt of another, there must be a clear undertaking; if the intent is doubtful the obligation does not exist. *Russell* v. *Clark's Executors*, 459.

HABEAS CORPUS.

The writ of *habeas corpus ad subjiciendum* does not lie to bring up a person confined in the prison bounds upon a *ca. sa.* issued in a civil suit. *Wilson, Ex parte*, 318.

COURTS OF THE UNITED STATES, 20.

HUSBAND AND WIFE.

DEED, 4; WRIT OF ERROR, 12.

INDICTMENT.

STATUTES, 7.

INFANCY.

1. Infancy is a bar to an action by an owner against his supercargo for breach of instructions; but not to an action of trover for the goods. *Vasse* v. *Smith*, 379.
2. Still, however, infancy may be given in evidence in an action of trover, upon the plea of not guilty; not as a bar, but to show the nature of the act which is supposed to be a conversion. *Ib.*
3. An infant is liable in trover, although the goods were delivered to him under a contract. *Ib.*

NATURALIZATION, 2.

INJUNCTION.

COURTS OF THE UNITED STATES, 4. 29. 30; EQUITY, 4–6; WRIT OF ERROR, 1.

INQUISITION.

1. An appeal lies from an order of the circuit court for the District of Columbia, quashing an inquisition in the nature of a writ of *ad quod damnum*. *Custiss* v. *Georgetown and Alexandria Turnpike Co.* 383.
2. If a statute merely requires an inquisition to be returned to, and recorded by the clerk of a court, the court has no jurisdiction over it. *Ib.*

INSOLVENT.

Under the Act of January 6, 1800, for the relief of insolvent debtors, (2 Stats. at Large, 4,) the debt is not discharged. *King* v. *Riddle*, 500.

COURTS OF THE UNITED STATES, 15; FRAUD, 2. 3.

INSURANCE.

1. A policy of insurance on a vessel, "at and from," an island, protects her in sailing from port to port of the island to take in a cargo. *Dickey* v. *Baltimore Ins. Co.* 554.
2. Departure to learn whether a port, not of destination, is blockaded, is a deviation. *Maryland Ins. Co.* v. *Woods*, 310.
3. Liberty to "touch at C. for stock, and to take in water," does not justify taking on board jackasses and bullocks as cargo. Delay for that purpose is a deviation, and it is not material that the risk was not increased. *Maryland Ins. Co.* v. *Le Roy*, 441.
4. Under a warranty by the assured, "free from average, unless general," the underwriter is not liable for a partial loss. *Biays* v. *Chesapeake Ins. Co.* 600.
5. The destruction of part of a cargo, consisting of the same kind of articles, is a partial loss only; not a total loss of such part. *Ib.*
6. The clause authorizing the assured, in case of any loss or damage, to sue, labor, &c., applies only to losses within the policy. *Ib.*
7. If insurance be made for whom it may concern, undue concealment as to the parties interested cannot be alleged. *Hodgson* v. *Marine Ins. Co. of Alexandria*, 201.
8. In such a case, the policy covers the property of a belligerent, unless there is an express warranty that it is neutral property. *Ib.*
9. A promissory note given for the premium, is a sufficient consideration for the contract of insurance. *Ib.*
10. A valuation, not fraudulent, is binding. *Ib.*
11. An innocent misrepresentation, not material to the risk, does not avoid the policy. *Ib.*

12. It is not necessary, in an action of covenant on a sealed policy, to aver an abandonment in the declaration. *Ib.*
13. An exception of certain risks in a policy of insurance is not a warranty. *Yeaton* v. *Fry*, 285.
14. Insurance against "all risks, blockaded ports and Hispaniola excepted," covers the risks of a voyage to a port in fact blockaded, but not known to be so till the vessel was warned off. *Ib.*
15. Such an exception covers only the particular dangers of blockade, which induced the exception. *Ib.*
16. Sailing for a port knowing it to be blockaded, would have incurred a blockade risk, and been within the exception. *Ib.*
17. If the interest of one joint owner of a cargo be insured, and if that interest be neutral, it is no breach of the warranty of neutrality if the other joint owner, whose interest is not insured, be a belligerent. *Livingston* v. *Maryland Ins. Co.* 400.
18. The assured are not understood to warrant that the whole cargo is neutral, but that the interest insured is neutral. *Ib.*
19. Anti-neutral conduct forfeits the warranty of neutrality of the vessel in a policy. *Maryland Ins. Co.* v. *Woods*, 310.
20. Without such a warranty an attempt to enter a blockaded port does not put an end to the policy. *Ib.*
21. Under a policy containing a warranty of neutrality of the vessel, "proof of which to be required in the United States only," a foreign sentence of condemnation for breach of blockade, is not conclusive evidence of breach of that warranty. *Ib.*
22. A ship warranted to be an American, is impliedly warranted to conduct as American, and an attempt to enter a blockaded port, knowing it to be blockaded, forfeits that character. *Fitzsimmons* v. *Newport Ins. Co.* 65.
23. If a sentence of a vice-admiralty court be taken as conclusive of the particular facts which it alleges, those facts not amounting to a cause of condemnation, it does not falsify a warranty of neutrality. *Ib.*
24. The effect of a misrepresentation or concealment, upon a policy, depends upon its materiality to the risk, which must be decided by a jury, under the direction of a court. *Livingston* v. *Maryland Ins. Co.* 400.
25. The operation of a concealment, on the policy, depends on its materiality to the risk; and this materiality is a subject for the consideration of a jury. *Maryland Ins. Co.* v. *Ruden's Administrator*, 426.
26. If a vessel take on board papers which increase the risk of capture, and if it be not the regular usage of the trade insured to take such papers, the non-disclosure of the fact that they would be on board will vacate the policy. *Livingston* v. *Maryland Ins. Co.* 400.
27. To constitute a misrepresentation, in obtaining insurance, there must be an affirmation or denial of some fact, or an allegation which would plainly lead the mind to a conclusion. *Ib.* 648.
28. If the expressions are ambiguous, the insurer should ask for an explanation. *Ib.*
29. If Spanish papers are taken on board by the usage of the trade, to be used in a Spanish port to protect the property, it is not a breach of warranty of neutrality to conceal them from a British cruiser. *Ib.*
30. If the letter submitted to the underwriters, ordering the insurance, refer to another letter previously laid before them, which letter contained information that the vessel had permission to trade to the Spanish colonies, the underwriters are bound to notice that fact, and to know that the vessel would take all the papers necessary to make the voyage legal. *Ib.*
31. No acts, justifiable by the usage of the trade, and done by the plaintiffs to avoid confiscation under the laws of Spain, can avoid the policy. *Ib.*

32. If the plaintiffs do any act which increases the risk of capture and detention according to the common practice of the belligerent, it may avoid the policy. It is not necessary that the risk thus increased, should be the risk of rightful capture, according to the law of nations. *Ib.*

33. If insurance be made at and from A to B, and at and from B back to A, unnecessary delay at B is a deviation. *Oliver* v. *Maryland Ins. Co.* 635.

34. What delay is unnecessary, must depend on the circumstances of each case, and not upon a usage of the port; but the latter may be evidence of what was necessary. *Ib.*

35. If the vessel remain at B long enough to take a cargo, and then sail without cargo for C, where it is usual to touch, and there remain and take a cargo, this is a deviation, unless the delay was in conformity with a usage to wait at B to have a cargo collected at C. *Ib.*

36. Even extraordinary indefinite danger of capture, will not justify delay at a port. The danger must be obvious and immediate in reference to the situation of the ship at the particular time. *Ib.*

37. Total loss of the cargo during the voyage, does not constitute a technical total loss of the vessel. *Alexander* v. *Baltimore Ins. Co.* 140.

38. The obligation of the insured to contribute, does not cease in consequence of his forfeiture of his own insurance by his own neglect. All the members of the company are bound by the act of the majority. No member can divest himself of his obligations as such, but according to the rules of the society. *Korn* v. *Mutual Assurance Society of Virginia*, 364.

39. The additional premium upon a revaluation under the rules of the society, is only upon the excess. *Atkinson* v. *Mutual Assurance Society of Virginia*, 370.

40. An amendment of the charter of a Mutual Insurance Company, made by the legislature, at the request of the company, empowering them to divide their risks into two classes, and to value each risk anew, is valid, and a by-law to carry this into effect is in conformity with the nature of the institution, and binding on members, who subsequent to the Amendatory Act, assented generally to the constitution and laws of the company. *Mutual Assurance Society of Alexandria* v. *Korn*, 589.

BLOCKADE; DISTRICT OF COLUMBIA, 4; EVIDENCE, 5. 14; JUDGMENT, &c., 9; PLEADING, 6. 7.

INTEREST.

If the property, ordered to be restored, be sold, interest is not to be paid, unless specially ordered by the decree. *Himely v. Rose*, 277.

PAYMENT, 1; USURY.

INTERNATIONAL LAW.

1. In every case of a foreign sentence condemning a vessel as prize of war, the authority of the tribunal to act as a prize court is examinable. *Rose* v. *Himely*, 87.

2. So is the question, whether the *res* was so situated as to be subject to the jurisdiction. *Ib.*

3. Whether a revolted colony is to be treated as a sovereign state, is a political question, to be decided by governments, not by courts of justice; and the courts of the United States must consider the ancient state of things as remaining, until the sovereignty of the revolted colony is acknowledged by the government of the United States. *Ib.*

4. Belligerent rights may be superadded to those of sovereignty. To which class any particular act belongs, the nature of the law and the proceedings under it, must determine. *Ib.*

5. In this case, from the nature of the laws, under which the seizure was made, they are territorial regulations, proceeding from the sovereign power, and intended to enforce sovereign rights, and the tribunal professing to execute them, must be considered as acting as an instance and not as a prize court. *Ib.*
6. Whatever may be the municipal law under which a tribunal acts, if it exercise a jurisdiction which its sovereign is not allowed by the laws of nations to confer, its decrees must be disregarded, out of the dominions of its sovereign. *Ib.*
7. The seizure, *de facto*, out of his dominions, will not give jurisdiction to a sovereign over a thing never brought within them. *Ib.*
8. He cannot authorize a seizure, on the high seas, for a breach of a municipal regulation. *Ib.*
9. The sentence in this case being void, the property was not changed; but the property having been brought to this country, which was its destination, the libellant must allow for freight, duties, insurance, and such other charges as would have been borne by them if importers. *Ib.*
10. A seizure for the breach of a municipal regulation, made within the territorial jurisdiction of the sovereign, being valid, and conferring possession on the sovereign, his courts may proceed to sentence, though the *res* be lying in a port of another friendly power. *Hudson* v. *Guestier*, *Lafont* v. *Bigelow*, 107.
11. A public armed vessel, in the service of a sovereign at peace with the United States, is not within the ordinary jurisdiction of our tribunals while in a port of the United States. *Schooner Exchange* v. *M'Faddon*, 478.
12. But the sovereign power of the United States may interpose, and impart such a jurisdiction. *Ib.*
13. The several States composing the Union, became entitled, on the 4th of July, 1776, to all the rights and powers of sovereign states, so far at least as respects their internal regulations; and among those rights was that of the allegiance of their citizens. *M'Ilvaine* v. *Coxe's Lessee*, 74.

BLOCKADE; CONFLICT OF LAWS, 2; JUDGMENT, &c. 4.

JOINT DEBTOR.

JUDGMENT, &c. 8.

JOINT DEFENDANTS.

If the plaintiff declare against two, on a judgment, he cannot take judgment against one alone, until he has gone through with such proceedings as the law provides to compel the appearance of the other. *Barton* v. *Petit*, 510.

JOINT TENANTS AND TENANTS IN COMMON.

1. In Vermont, tenants in common may join in an action of ejectment. *Hicks* v. *Rogers*, 57.
2. One tenant in common cannot maintain ejectment against his cotenant, without actual ouster. *Barnitz's Lessee* v. *Casey*, 618.

LIMITATIONS OF SUITS, 7.

JUDGMENT AND DECREE.

1. The inferior court of common pleas of the State of New Jersey, having general jurisdiction in cases of treason, was not, technically, an inferior court, and its judgment of forfeiture, though erroneous, cannot be disregarded while unreversed. *Kempe's Lessee* v. *Kennedy*, 223.
2. Erroneous judgments of an inferior court, which has exceeded its jurisdiction, are void; those of other courts only voidable. *Ib.*

8. A foreign condemnation, for breach of a municipal regulation, is valid, though the seizure is alleged and proved, in a collateral action here, to have been made on the high seas. *Hudson* v. *Guestier*, 406.

4. A foreign sentence of a competent court, though avowedly contrary to the law of nations, is valid, here, because not examinable, But congress might make it examinable by our courts, if it thought fit. *Williams* v. *Armroyd*, 603.

5. The sentence of a competent court, proceeding *in rem*, is conclusive with respect to the thing itself, and works an absolute change of the property. *Ib.*

6. A sale, before condemnation, by one acting under the possession of the captor, does not divest the court of jurisdiction, and the condemnation relates back to the capture, affirms its legality, and establishes the title of the purchaser. *Ib.*

7. A judgment against the person to be indemnified, fairly recovered, is admissible, in a suit on the contract of indemnity. *Clark's Executors* v. *Carrington*, 546.

8. A judgment against one joint debtor, in an action of assumpsit, cannot be pleaded in bar by the other alone, in an action against both, founded on the original promise of both. *Sheehy* v. *Mandeville*, 391.

9. The sentence of a foreign court of admiralty, condemning a vessel, for breach of blockade, is conclusive evidence of that fact, in an action on the policy of insurance. *Croudson* v. *Leonard*, 163.

10. A verdict and judgment that the mother was born free, is not conclusive evidence of the freedom of her children, unless between the same parties or privies. *Wood* v. *Davis*, 525.

11. *Nil debet* is not a good plea to an action founded on a judgment of another State. *Mills* v. *Duryee*, 631.

ABANDONMENT, 4; BOND, 5. 6; COSTS, 1–3; COURTS OF THE UNITED STATES, 29; EQUITY, 4. 5; EVIDENCE, 8–13; EXECUTION; INSURANCE, 21. 23; JOINT DEFENDANTS; NATURALIZATION, 1. 3; PARTIES, 1. 2; PLEADING, 9; PRIZE, 3; VERDICT; WRIT OF ERROR, 1. 10.

JURISDICTION.

1. If an offence be committed on land, the offender must be tried by the court having jurisdiction over that territory where the offence was committed. *Ex parte Bollman; Ex parte Swartwout*, 23.

2. An affidavit made before one magistrate may justify a commitment by another. *Ib.*

ADMIRALTY; COSTS, 1; COURTS OF THE UNITED STATES; INQUISITION, 2; INTERNATIONAL LAW, 1–12.

JURY.

1. After a juror is sworn, no exception can be taken to him by a party, on account of his being an inhabitant of another county. *Mima Queen* v. *Hepburn*, 535.

2. If a juror be challenged for favor, and upon examination before the triors, he declare that, if the evidence should be equal, he should give a verdict in favor of that party upon whom the burden of proof lies, the court, in the exercise of a sound discretion, ought to reject him, although the bias should not be so strong as to render it positively improper to allow him to be sworn. *Ib.*

3. Jurors in the circuit court for the district of Pennsylvania, are entitled to the fee of one dollar and twenty-five cents per diem, for their attendance. *Ex parte Lewis*, 162.

ABANDONMENT, 6. 8; ADMIRALTY; INSURANCE, 24. 25; LAW AND FACT; PRACTICE, 2.

LAND LAWS.

PUBLIC LANDS.

LAW AND FACT.

The court cannot be required to give to the jury an opinion involving matter of fact; and when such a request is made, is not bound to separate the law from the fact and instruct on the former, though it may be proper to do so. *Smith* v. *Carrington*, 19.

ABANDONMENT, 6. 8; INSURANCE, 23. 24. 25.

LAW OF NATIONS.

INTERNATIONAL LAW.

LEASE.

A lease for one year, followed by an occupation for three years, is not a lease for three years. *Alexander* v. *Harris*, 111.

PLEADING, 3.

LIBEL.

AMENDMENT, 1; COURTS OF THE UNITED STATES, 2.

LIEN.

BOTTOMRY; TREATY.

LIMITATIONS OF SUITS.

1. The exception of merchants' accounts, in the Statute of Limitations of Virginia, applies to actions of assumpsit as well as account. *Mandeville* v. *Wilson*, 178.
2. An account closed by the cessation of dealings is not an account stated. *Ib.*
3. It is not necessary that any item should come within the five years. *Ib.*
4. The exception in the Maryland Statute of Limitations, in favor of "such accounts as concerns the trade or merchandise between merchant and merchant, their factors and servants, which are not residents within this province," applies to dealings between a merchant creditor residing out of Maryland, and a debtor residing in Maryland. *Bond* v. *Jay*, 565.
5. And in order to take the case out of the exception, it is not sufficient to aver that the creditor returned to, came, and was within the State of Maryland, after the cause of action accrued, and more than three years before bringing the suit. It is necessary to aver that the plaintiff became a resident in Maryland more than three years before the suit was brought. *Ib.*
6. A removal from the county which does not in fact obstruct an action, is not within the exception contained in the 14th section of the act of limitations of Virginia. *Wilson* v. *Koontz*, 512.
7. In order to avoid the plea of the statute of limitations to an action by joint tenants, it is necessary to show that all the plaintiffs were under a disability to sue. *Marsteller* v. *M'Clean*, 494.
8. The act of limitations of the State of Georgia, (1767,) does not require an entry within seven years after the title accrued, unless there is an adverse possession. *Shearman* v. *Irvine's Lessee*, 139.
9. As to when the Act of Limitations of Virginia is not a bar, see *Hopkirk* v. *Bell*, 56.

EVIDENCE, 25; FOREIGN ATTACHMENT, 2.

MANDAMUS.

1. It being suggested that a State was the owner of a fund proceeded against in the district court, in admiralty, the claim of the State was examined, and this court having found that the State was not a necessary party, a peremptory *mandamus* to the district judge to proceed, to adjudicate between the individual parties, was awarded. *United States* v. *Peters*, 206.
2. The power of the circuit courts of the United States to issue the writ of mandamus

is confined exclusively to those cases in which it may be necessary to the exercise of their jurisdiction. *M'Intire* v. *Wood*, 647.

PRACTICE, 10.

MARSHAL.

ARREST; PRACTICE, 10; PROCESS, &c.

MERGER.

CONTRACT, 1. 2.

MISTAKE.

EQUITY, 7.

MORTGAGE.

CONFISCATION, 1; DEED, 2; SALE.

NATURALIZATION.

1. Under the Naturalization Act of January 29, 1795, (1 Stats. at Large, 414,) the administration of the oath of allegiance amounts to a judgment of the court for the admission of the applicant to the rights of a citizen, and implies that all prerequisites had been complied with. *Campbell* v. *Gordon*, 357.
2. Under the act of April 14, 1802, (2 Stats. at Large, 153,) a minor child of a father so naturalized, became a citizen, though not then within the United States, provided she was resident therein at the time of the passage of the act. *Ib.*
3. The judgment of a court of competent jurisdiction admitting an alien to be a citizen, need not find the facts requisite by law to entitle the applicant to be so admitted. *Stark* v. *The Chesapeake Insurance Co.* 602.

ALIEN; CITIZEN.

NEW TRIAL.

1. Refusal of a new trial cannot be assigned as error. *Henderson* v. *Moore*, 176; *Marine Ins. Co. of Alexandria* v. *Young*, 226.
2. If evidence is illegally admitted, this court cannot inquire into its weight or importance, but must reverse the judgment. *Smith* v. *Carrington*, 19.

WRIT OF ERROR, 7.

NON-INTERCOURSE.

STATUTE 3–6.

PARTIES.

1. To a bill by purchasers from the judgment debtor, to set aside a legal title to lands obtained by the levy of an execution, upon the ground that the judgment was satisfied before the levy, both the judgment debtor and creditor are necessary parties, though the judgment creditor was not a purchaser under the levy. *Field* v. *Holland*, 303.
2. Being made parties, the answer of the judgment creditor is evidence against the complainants; but the answer of the judgment debtor is not evidence in their favor against the other defendants. *Ib.*
3. Assignees in bankruptcy are indispensable parties to a bill against the bankrupt and certain persons to whom he conveyed property in trust before he was decreed a bankrupt. *Russell* v. *Clark's Executors*, 459.

COURTS OF THE UNITED STATES, 6; DEBTOR AND CREDITOR, 2.

PARTNERSHIP.

1. An assignment by one partner, in the name of the copartnership, of partnership effects and credits, for the benefit of particular creditors, is valid. *Harrison* v. *Sterry*, 267.
2. Under a separate commission of bankruptcy against one partner, only his interest in the joint effects passes. *Ib.*

3. If the members of a copartnership agree among themselves, that the firm shall pay an individual partner's debt, it becomes an equitable claim against the assets of the firm. *Finley* v. *Lynn*, 386.
4. An assignee of one copartner, may maintain a bill for an account, against the other partners and the agent of the partnership, which was formed to deal in lands. *Pendleton* v. *Wambersie*, 23.

ACTION; BANKRUPT, 1.

PATENT.

Under the act of February 21, 1793, (1 Stats. at Large, 318,) the assignee of part of a patent right, cannot maintain an action at law. *Tyler* v. *Tuel*, 419.

PAYMENT.

1. Where a bond was given to the United States, to pay a sum of money on a day certain, to their agent in Europe, payment after the day, and mere receipt of such payment without any new agreement, do not destroy the right to interest upon the money during the time the obligor was in default. *United States* v. *Gurney*, 127.
2. Nor does a special agreement, concerning damages, applicable to non-payment in Europe, affect the right to damages growing out of payment there, after the day. *Ib.*
3. If a negotiable note of one joint debtor be received in payment, the debt is extinguished. *Sheehy* v. *Mandeville*, 391.
4. When a collector of revenue has given two bonds for his official conduct at different periods, and with different sureties, a promise by the supervisor to apply his payments exclusively to the discharge of the first bond, although some of the payments were for money collected and paid after the second bond was given, does not bind the United States, and does not amount to an application of the payments to the first bond. *United States* v. *January*, 673.
5. A debtor of the United States, who puts evidence of debts due to himself into the hands of a public officer of the United States, to collect and apply the money, when received, to the credit of such debtor in account with the United States, is not entitled to such credit until the money gets into the hands of a public officer of the United States entitled to receive it. *United States* v. *Patterson*, 676.
6. Its being in the hands of an agent of a person who, at the time when the claims were put into his hands for collection, was a public officer of the United States, entitled to receive debts due to the United States, but whose office became extinct before the money was received by his agent, is not sufficient to entitle such debtor to a credit in account with the United States therefor. *Ib.*
7. If the debtor does not elect to make a particular application of a payment, at the time it is made, the creditor may, at any time afterwards, elect to what debt to apply it. *Mayor and Commonalty of Alexandria* v. *Patten*, 121.
8. If neither the debtor nor the creditor has made an application of payments, it devolves on the court to make it, and it being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious. *Field* v. *Holland*, 303.
9. The presumption of payment from lapse of time may be repelled. *Higginson* v. *Mein*, 155.
10. Issue directed as to the fact of payment. *Ib.*

EVIDENCE, 17.

PLEADING.

1. A plea which contains, in substance, sufficient to bar the bill, if replied to, and found true in fact, is a bar, though defective in form. *Stead's Executors* v. *Course*, 152.
2. A plea of performance of the condition of a bond, without oyer, is bad on demurrer. *United States* v. *Arthur*, 250.

3. *Rien in arrear*, admits the demise laid in the avowry. *Alexander* v. *Harris*, 111.
4. An averment in a declaration, that the legislature had no authority to convey, is not answered by a plea that the governor had authority to convey. *Fletcher* v. *Peck*, 328.
5. It is not necessary that a breach should be assigned in the very words of a covenant; it is sufficient if a substantial breach is unequivocally shown. *Ib.*
6. In an action of covenant on a policy under seal, all special matter of defence must be pleaded. *Marine Ins. Co. of Alexandria* v. *Hodgson*, 373.
7. Under the plea of covenants performed, the defendant cannot give evidence which goes to vacate the policy. *Ib.*
8. If *profert* is made in one count, and oyer granted, the deed on the record is taken to be that declared on in that count only. *Hughes* v. *Moor*, 506.
9. A count, stating the making of a negotiable note by the defendant, payable to the plaintiff, the indorsement by the latter, protest of the note for non-payment, due notice of protest to the plaintiff, payment thereof by him, and a promise by the defendant, in consideration of the premises, to pay to the plaintiff the contents of the note, together with the cost of protest, is sufficient to support a judgment. *Morgan* v. *Reintzel*, 526.
10. If a declaration on a contract, by mistake, contain the name of the vendee, in a context which shows that the vendor was intended, the variance is not material. *Ferguson* v. *Harwood*, 596.

BILLS OF EXCHANGE, &c. 6; DEMURRER; FORFEITURE, 2–6; FRAUD, 1; INSURANCE, 12; JUDGMENT, &c. 8. 11; REVENUE LAWS, 7.

POSTMASTER.

1. Under an allegation of negligence by a postmaster, evidence cannot be given of negligence of his sworn assistant. *Dunlop* v. *Munroe*, 522.
2. A mere omission, by a postmaster, seasonably to forward a letter, is not a cause of action; some damage must be proved to have been suffered by the plaintiff. *Ib.*

PRACTICE.

1. This court will not rehear a cause after the term in which it was decided. *Hudson* v. *Guestier*, 430.
2. The court is not bound to give a construction to an ambiguous answer to a question in a deposition, upon the request of the jury. *Marine Ins. Co. of Alexandria* v. *Young*, 226.
3. This court will give time to procure affidavits as to the value of the matter in dispute. *Rush* v. *Parker*, 265.
4. By consent, pleadings were amended in this court, and the cause again heard, on the amended pleadings. *Fletcher* v. *Peck*, 328.
5. After a cause is remanded to the inferior court, such court may receive additional pleas, or admit amendments to those already filed, even after the appellate court has decided such pleas to be bad upon demurrer. *Marine Ins. Co. of Alexandria* v. *Hodgson*, 373.
6. Where the complainant was entitled to an account in the court below, but did not apply for it, resting his case on another ground, not tenable, this court will remand the cause to have such account taken. *Finley* v. *Lynn*, 386.
7. It is too late to question the jurisdiction of the circuit court after the cause has been sent back by mandate. *Skillern's Executors* v. *May's Executors*, 396.
8. It is a matter of discretion with a court whether it will compel a party to join in a demurrer to evidence. *Young* v. *Black*, 669.
9. A demurrer to evidence ought not to be allowed where the party demurring refuses to admit the facts which the other side attempts to prove, nor where he offers contradictory evidence, or attempts to establish inconsistent propositions. *Ib.*

10. Where a writ of error was brought to reverse the order of the district court for the territory of Orleans, staying the proceedings in a suit brought by the plaintiff against the defendant, marshal of the territory, upon a suggestion of the attorney for the United States, who was not party to the proceeding; after argument the plaintiff's counsel dismissed the writ of error, and moved for a *mandamus*, *nisi*, to the district judge, in the nature of a *procedendo*, which was granted. *Livingston* v. *Dorgenois*, 677.

11. The act incorporating the Bank of Alexandria provided that in suits brought by the bank, upon notes made negotiable therein, an issue should be made up, and a trial had at the return term of the writ. The appearance day in Virginia for all process was the day after the term. *Held*, that in such a suit the court below might rule the defendant below to a trial at the return term. *Young* v. *The Bank of Alexandria*, 188.

APPEAL, 3; AUDITOR, 2. 3; BOND, 5; EVIDENCE, 23; PAYMENT, 10.

PRIZE.

1. A vessel libelled as prize, is in the custody of the law, and under the control of the court. *Jennings* v. *Carson*, 2.
2. A prize court, in which proceedings were instituted, has power to order a sale, even after an appeal. *Ib.*
3. Where a decree, condemning a vessel as prize, also ordered a sale, and an appeal was taken, though it was irregular to sell on that decree, this irregularity will not render the captors liable to pay the amount of the sales, which did not come into their hands, but were under the control of the court. *Ib.*
4. A belligerent cruiser, who with probable cause, seizes a neutral vessel, and takes her in for adjudication, and proceeds regularly, is not a wrongdoer, and is not liable for damages. *Ib.*

INTERNATIONAL LAW, 1–10.

PROCESS, SERVICE OF.

The marshal is bound to serve process as soon as he reasonably can. *Kennedy* v. *Brent*, 361.

WRIT OF ERROR, 12. 13–15.

PUBLIC LANDS.

1. Lands lying within the limits of the Zanesville land district, created by the act of March 3, 1803, (2 Stats. at Large, 237, s. 6,) could not be sold at the Marietta land-office, after the passage of that act. *Matthews* v. *Zane's Lessee*, 200.
2. Lord Fairfax, at the time of his death, had the absolute property, seisin, and possession of the waste and unappropriated lands in the northern neck of Virginia. *Fairfax's Devisee* v. *Hunter's Lessee*, 684.
3. The commonwealth of Virginia could not grant the unappropriated lands in the northern neck until its title should have been perfected by possession; and the British treaty of 1794 confirmed the title to those lands in the devisee of Lord Fairfax. *Ib.*
4. Under the laws of North Carolina, the first grant under a duplicate warrant was valid. *Blackwell* v. *Patton*, 626.
5. Though the land law of Kentucky furnishes a remedy for trying, at law, rights under entries, previous to the emanation of a patent, yet a court of equity has jurisdiction, upon the ground that an entry is notice, and a legal title afterwards acquired is subject to the equitable right. *Bodley* v. *Taylor*, 228.
6. This jurisdiction is to be exerted, in conformity with the principles of equity, and not merely upon the rules which would govern a court of law. *Ib.*
7. The certificate of the surveyor that a survey has been made by virtue of a warrant, is sufficient evidence that the warrant was in his possession when the survey was made. *Taylor* v. *Brown*, 238.
8. Under the land law of Virginia, the title, if it commence without an entry, begins with the survey, and is not lost by the neglect of the surveyor to record the survey pursuant to the direction of the act of 1748. *Ib.*
9. The principal surveyor may make a legal return of a survey, from the field notes

of his assistant who made the survey, and died before making a plat and certificate *Ib.*

10. A survey, though it include surplus land, is an appropriation of the land it covers, and cannot be reduced by a *caveat*, under the act of Virginia, of 1779. The patent relates in equity to the inception of the title, and he who has first appropriated the land, has the best equitable title, unless impaired by the circumstances of the case. *Ib.*

11. A locator under a warrant, undertakes to find vacant land, and acts at his own risk. *Ib.*

12. The equity of the prior locator in Virginia extends to the surplus land surveyed, as well as to that included in the warrant. *Ib.*

13. If a subsequent locator has embraced in his patent, land included in a prior entry, he must convey the legal title thereof to such prior locator, without a conveyance from the latter, of lands held by him, not within his entry, but within that of the subsequent locator, but not surveyed as part thereof. *Bodley* v. *Taylor*, 228.

14. An agent, to locate a warrant, who takes a title to himself, of land which he should have had surveyed for his principal, becomes a trustee for his principal. *Massie* v. *Watts*, 345.

15. Under the land law of Virginia, if by any reasonable construction an entry is supportable, it will be supported. *Ib.*

16. When a given quantity of land is to be laid off on a given base, it is to be in a parallelogram, unless this form would be repugnant to the entry; and where necessarily departed from, the departure should extend no further than the calls render necessary. *Ib.*

17. In Kentucky, if a natural object is called for, as about a certain distance from a fixed monument, and the object cannot be found, the call for it is rejected, and the distance mentioned taken as the precise distance. *Bodley* v. *Taylor*, 228.

18. If an entry be placed on a road, at a certain distance from a given point, by which the road passes, the distance is to be computed by the meanders of the road, and not by a straight line, unless there is something to show another intent. If only the quantity and one line are described the location is to be made in a square. *Ib.*

19. A call for the settlement and preëmption of J. before a location of the preëmption right of J. has been made, is substantially a call for the land of J. *Ib.*

20. In Kentucky, an entry is sufficient if it has that reasonable certainty which would enable a subsequent locator, by the exercise of a due degree of judgment and diligence, to locate his own land on the adjacent residuum. *Ib.*

21. A grant of an island by name, in the Potomac River, superadding the courses and distances of the lines thereof, which on resurvey are now found to exclude part of the island, will pass the whole island. *Lodge's Lessee*, v. *Lee*, 385.

COVENANT, 2–4; STATUTES, 2.

RECORD.

1. Under the act of May 26, 1790, (1 Stats. at Large, 122,) if a record have the attestation of the clerk and the seal of the court, together with the certificate of the presiding judge that the attestation is in due form, no evidence that the attestation is not in due form is admissible. *Ferguson* v. *Harwood*, 596.

2. Docket entries of another court are not admissible without laying some foundation, by showing why a copy of the record is not produced. *Ib.*

COURTS OF THE UNITED STATES, 13.

REFEREE.

AUDITOR, 1.

REGISTRATION.

DEED, 3–8.

REVENUE LAWS.

1. Duties upon goods imported, do not accrue until their arrival at the port of entry. *United States* v. *Vowell*, 297.
2. The duty upon salt, which ceased with the 31st of December, 1807, was not chargeable upon a cargo which arrived within the collection district before that day, but did not arrive at the port of entry until the 1st of January, 1808. *Ib.*
3. "Round copper bottoms turned up at the edge," are not liable to duties, although imported under the denomination of "raised bottoms." *United States* v. *Potts*, 264.
4. Under the Collection Act of February 18, 1793, (1 Stats. at Large, 316, ss. 32, 33,) cargo not subject to duties, and not belonging to the owner, master, or mariners, was not forfeited, by reason of a licensed vessel being employed in a trade for which she was not licensed. *Sloop Active* v. *United States*, 469.
5. Under the Collection Act of March 2, 1799, (1 Stats. at Large, 678, s. 71,) "probable cause for the prosecution," imports circumstances which warrant suspicion. *Locke* v. *United States*, 560.
6. The shipment of goods of foreign manufacture, from Boston to Baltimore, without certificates of the payment of duties, consigned to fictitious names, the marks of the packages having been changed, taken together, constitute probable cause for a prosecution, under the 50th section of the said act. *Ib.*
7. A count on that section is good, though it charge that the time, place, and vessel of importation were unknown to the attorney. *Ib.*
8. Under the Collection Act of March 3, 1799, s. 43, (1 Stats. at Large, 660,) goods landed from a derelict vessel, in order to save them, are not forfeited by being found without the custom-house marks. *Peisch* v. *Ware; United States* v. *Cargo of the Ship Favourite*, 132.
9. The 51st section of the same act applies only to removals by the owner, or with his consent, or connivance. *Ib.*
10 Under the 52d section, the misconduct of mere strangers does not work a forfeiture. *Ib.*
11. The law punishes the attempt, not the intention, to defraud the revenue by false invoices. *United States* v. *Riddle*, 276.
12. A doubt concerning the construction of a law may be good ground for seizure, and authorize a certificate of probable cause. *Ib.*
13. A collector of the revenue of the United States has no authority to receive duties after his removal from office, though they became payable while he was in office. *Sthreshley* v. *United States*, 57.

FORFEITURE, 5. 6.

SALE.

1. Parties may make a conditional sale, but the leaning of courts of equity is against such sales. *Conway's Executors* v. *Alexander*, 516.
2. The true inquiry is, whether the instrument was intended as a sale, or as security for a debt, and the extrinsic evidence, as well as the terms of the deed, must be examined to determine this question. *Ib.*
3. The absence of a covenant to repay is not decisive. *Ib.*
4. The fact that the sum paid, bore no proportion to the real value of the land, is entitled to great weight, upon the question whether a conditional sale was intended. *Ib.*

JUDGMENT, &c. 6; PRIZE, 2. 3; SHIPPING, 1. 2; STATUTES, 8. 9; TAX, 1. 2.

SALVAGE.

Fifty per centum of the gross value of goods saved from a derelict vessel in Delaware Bay, allowed for salvage. *Peisch* v. *Ware*, 132.

SEIZURE.

CAPTURE.

SET OFF.

If three joint owners of a cargo employ the master of the ship to sell it for them, and he afterwards become interested in the share of one of the joint owners, he cannot, in an action brought against him by the three joint owners to recover the amount of sales, set off his share of that amount. *Young* v. *Black*, 669.

BANKRUPT, 1; BILLS OF EXCHANGE, &c. 11.

SHIPPING.

1. If part of a vessel be sold by parol while at sea, and resold to the vendor on her arrival in port and before entry, she does not lose her American character, and no new register is necessary. *United States* v. *Willings*, 14.
2. If a vessel be sold at sea to an American citizen, she is not forfeited thereby. On her arrival in port she is an American vessel, and a new register cannot and need not be taken till the old one is surrendered. *Ib.*
3. Freight, *pro rata itineris*, is due only when there is a voluntary acceptance of the goods at an intermediate port. *Caze* v. *Baltimore Ins. Co.* 569.

BOTTOMRY; SET-OFF; STATUTES, 4.

SLAVE.

1. By the act of Assembly of Virginia, of 1758, no gift of a slave was valid, unless in writing and recorded; but parol evidence may be given of the existence of a deed of gift, to show the nature of possession which accompanied the deed. *Spiers* v. *Willison*, 151; *Ramsay* v. *Lee*, 152.
2. Five years' adverse possession of a slave in Virginia, gives a good title, upon which trespass may be maintained. *Brent* v. *Chapman*, 292.
3. If the owner of a slave permit her to remain in the possession of A. for four years, and A. then, without the assent of the owner, delivers her to B., who keeps her four years more, the possession of B. cannot be so connected with the possession of A. as to make it a fraudulent loan within the act of assembly of Virginia, in regard to B.'s creditors. *Auld* v. *Norwood*, 294.
4. The right to freedom, under the act of Maryland which prohibits the bringing of slaves into that State, is not acquired by the neglect of the master to prove to the satisfaction of the naval officer, or collector of the tax, that such slave had resided three years in the United States, although such proof be required by the act. *Scott* v. *Negro Ben*, 300.
5. The act of congress of the 28th of February, 1803, to prevent the importation of certain persons into certain States, where, by the laws thereof, their admission is prohibited, is not in force in the territory of Orleans. *Brigantine Amiable Lucy* v. *United States*, 422.

EVIDENCE, 7; JUDGMENT, &c. 10.

SPECIFIC PERFORMANCE.

1. A vendor may compel a specific execution of a contract for the sale of land, if he is able to give a good title at the time of the decree, although he had not a good title at the time when, by the contract, the land ought to have been conveyed. *Hepburn* v. *Auld*, 251.
2. But a court of equity will not compel a specific performance by the vendee, unless the vendor can make a good title to all the land contracted to be sold. *Ib.*
3. In equity, time may be dispensed with, if it be not of the essence of the contract. *Ib.*

STATE.

COURTS OF THE UNITED STATES, 4–7. 30; INTERNATIONAL LAW, 13; MANDAMUS, 1.

STATUTES.

1. If a court of law can, in any case, inquire into the motives of members of the legislature for voting for a law, it cannot do so collaterally, in a suit between individuals, to which the State is not a party. *Fletcher* v. *Peck*, 328.
2. In construing a statute of a State concerning lands, this court adopts the construction settled in the state courts, though not in accordance with its own opinion. *M'Keen* v. *Delancy's Lessee*, 181.
3. Congress may make the revival of a law conditional upon a fact then contingent, and empower the President to declare, by his proclamation, that such fact has occurred, and the law is revived. *Brig Aurora* v. *United States*, 583.
4. A vessel having violated a law of the United States, cannot be seized for such violation, after the law has expired, unless some special provision be made therefor by statute. *United States* v. *Ship Helen*, 371.
5. Produce of a foreign country once imported into the United States, and exported thence to a foreign port, cannot be again brought hither under the Non-Intercourse Act of March 1, 1809, (2 Stats. at Large, 528.) *Schooner Hoppet* v. *United States*, 585.
6. Under the non-intercourse laws in force, March 15, 1811, a vessel could not lawfully sail from a foreign port with a cargo, bound for a port of the United States, and come into the waters of the United States, for the purpose of making inquiry if she might land her cargo. *Brig Penobscot* v. *United States*, 568.
7. The act of June 27, 1798, (1 Stats. at Large, 573,) to punish frauds committed on the Bank of the United States, is so repugnant as to be insufficient to support an indictment. *United States* v. *Cantril*, 57.
8. The act of assembly of Maryland, which authorized the commissioners of the city of Washington to resell lots for default of payment by the first purchaser, contemplates a single resale only; and by that resale the power given by the act is executed. *Oneale* v. *Thornton*, 318.
9. By selling and conveying the property to a third purchaser, the commissioners precluded themselves from setting up the second sale, and the second purchaser, by making this defence, affirmed the title of the third purchaser. *Ib.*

DEED, 4; EMBARGO, 4–6. 8–12; LIMITATIONS OF SUITS; PUBLIC LANDS, 1; REVENUE LAWS, 4. 5. 8–10.

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SUPERCARGO.

ABANDONMENT, 12; INFANCY, 1.

SURETY.

WITNESS.

TAX.

1. A tax collector, in selling land, must conform to the law from which his power is derived, otherwise he makes no title. *Stead's Executors* v. *Course*, 152.
2. If authorized to sell only enough to pay the tax, and he sells an entire tract, when a small part would have been sufficient, the sale is void. *Ib.*
3. The corporation of Alexandria has power to tax the lands of non-residents lying within the corporate limits. *Alexander* v. *The Mayor and Commonalty of Alexandria*, 172.

4. The power is not confined to half-acre lots. *Ib.*
5. But the tax cannot be recovered by motion, if the non-resident owner has other property within the town. *Ib.*

TENANTS IN COMMON.

JOINT TENANTS, &c.

TREASON.

1. To constitute treason war must be actually levied. *Ex parte Bollman; Ex parte Swartwout*, 23.
2. A conspiracy to subvert the government by force, is not treason. *Ib.*
3. If a body of men be actually assembled for the purpose of effecting by force a treasonable design, all who perform any part, however minute, and however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors. *Ib.*
4. The mere enlistment of men, who are not assembled, is not a levying of war. *Ib.*

TREATY.

1. The treaty of peace, saved liens upon lands for debts. *Higginson* v. *Mein*, 155.
2. The "interest in lands by debts," intended to be protected by the 5th article of the treaty of peace with Great Britain, must be an interest held as security for money at the time of the treaty. *Owings* v *Norwood's Lessee*, 288.

CITIZEN, 3; COURTS OF THE UNITED STATES, 22–24; EVIDENCE, 21.

TRESPASS.

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TROVER.

INFANCY.

UNITED STATES.

AGENT; BANKRUPT, 2; PAYMENT, 4–6.

UNITED STATES BANK.

COURTS OF THE UNITED STATES, 9; STATUTES, 7.

USAGE.

CUSTOM AND USAGE.

USURY.

If an agent, who has, by permission of his principal, sold 8 per cent. stock, applies the money to his own use, and being pressed for payment gives a mortgage to secure the repayment of the amount of the stock with 8 per cent. interest thereon, it is usury. *De Butts* v. *Bacon*, 391.

VARIANCE.

EVIDENCE, 9–11. 18; PLEADING, 4. 10.

VERDICT.

A verdict "for the defendants, subject to the opinion of the court upon the points reserved," does not authorize an absolute judgment for the defendants, unless the points reserved and the opinion of the court thereon, are stated on the record. *Smith* v. *Delaware Ins. Co.* 605.

WARRANTY.

INSURANCE, 4. 13. 17–23. 29.

WASHINGTON.

STATUTES 8. 9.

WITNESS.

The principal obligor in a bond is not a competent witness for the surety, in an action

upon the bond; the principal being liable to the surety for costs in case the judgment should be against him. *Riddle* v. *Moss*, 513.

EVIDENCE, 16.

WRIT OF ERROR.

1. No writ of error or appeal lies to an interlocutory decree dissolving an injunction. *Young* v. *Grundy*, 317.
2. No writ of error lies to the supreme court of the United States, to reverse the judgment of a circuit court in a civil action, which has been carried up to the circuit court from the district court by writ of error. *United States* v. *Goodwin*, 472; *The United States* v. *Gordon*, 532.
3. By the 10th section of the Judiciary Act of 1789, writs of error lie from decisions of the district court for the Maine district, to the circuit court of Massachusetts, in the same manner as from other district courts to their respective circuit courts; notwithstanding that the district court of Maine has all the original jurisdiction of a circuit court. *United States* v. *Weeks*, 172.
4. An error, which could not have injured the plaintiff in error, is not cause for reversing a judgment. *Blackwell* v. *Patton*, 626.
5. The refusal of the court below to reinstate a cause which has been legally dismissed, is no ground for a writ of error. *Welch* v. *Mandeville*, 493.
6. The refusal of the court below to continue a case, cannot be assigned for error. *Woods* v. *Young*, 86.
7. The refusal of an inferior court to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as error. *Marine Ins. Co. of Alexandria* v. *Hodgson*, 373.
8. It is not a ground for a writ of error that the judge below refused to reinstate a cause after nonsuit. *United States* v. *Evans*, 262.
9. *Quære.* Whether the refusal of a court to compel a party to join in a demurrer to evidence, can in any case be assigned for error. *Young* v. *Black*, 669.
10. A writ of error to the circuit court for the District of Columbia, founded on a refusal by that court to quash a *ca. sa.*, issued upon a judgment, certified into that court by two justices of the peace, under an act of assembly of Maryland, will be quashed. *Mountz* v. *Hodgson*, 124.
11. A writ of error issued in September, may bear *teste* of the February term preceding, and may be returnable to the next February term, notwithstanding the intervention of the August term between the *teste* and return of the writ. *Blackwell* v. *Patten*, 528.
12. If the defendant below marries after the judgment, and before the service of the writ of error, the service of the citation upon the husband is sufficient. *Fairfax's Executor* v. *Fairfax*, 179.
13. The service of a writ of error is the lodging a copy thereof for the adverse party in the office of the clerk of the court where the judgment was rendered. *Wood* v. *Lide*, 64.
14. If a writ of error be served before the return day, it may be returned after, even at a subsequent term; and the appearance of the defendant in error waives all objection to the irregularity of the return. *Ib.*
15. This court will not compel a hearing, unless the citation be served thirty days before the first day of the term. *Welsh* v. *Mandeville*, 281.
16. If the counsel on neither side appear when the cause is called, the writ of error will be dismissed. *Radford* v. *Craig*, 267.
17. The rule to dismiss a writ of error for not filing the transcript of the record within the first six days of the term, does not apply to cases where the transcript shall have been filed before the motion to dismiss. *Bingham* v. *Morris*, 469.

BILLS OF EXCHANGE, &c. 6; COURTS OF THE UNITED STATES, 19. 25; DISTRICT OF COLUMBIA, 1. 2; EXCEPTIONS; EXECUTION; NEW TRIAL, 1; PRACTICE, 10.

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